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IN THE

SUPREME COURT

OF

THE UNITED STATES

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SUPREME COURT, U.S.

OCTOBER TERM, 1986

NO. A-348

DANNY JOE BRADLEY,

Petitioner,

-against-

THE STATE OF ALABAMA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

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December 10, 1986

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To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND
THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner, DANNY JOE BRADLEY, respectfully requests that a writ of certiorari to review the order of the Supreme Court of Alabama, dated September 12, 1986, which denied rehearing of petitioners appeal of an order of that Court, dated July 25, 1986, which affirmed the judgment of the Calhoun Circuit Court, State of Alabama, which sentenced the Petitioner to death.

On November 6, 1986, the Hon. Louis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, issued

an order extending the time for filing of a petition for a writ of certiorari in this case up to and including December 11, 1986.

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying Petitioner a new trial after holding a hearing which disclosed that exculpatory material was withheld from the Petitioner in violation of a discovery order, to wit: that a person other than the Petitioner had confessed to the crime of which the Petitioner was convicted, in violation of the Fourteenth Amendment of the United States Constitution and the mandate of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963)?

2. Whether the prosecutor's questions in cross-examination of the Petitioner, and his comments in closing argument concerning the Petitioners post-arrest silence were a violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution?

3. Whether evidence obtained pursuant to a consent form signed by the Petitioner was properly admitted despite the finding that this consent form was signed by the Petitioner while he was in custody pursuant to an illegal arrest, in violation of the Fourth and Fourteenth Amendments of the United States Constitution?

4. Whether the examination of the Petitioner by the Trial Court Judge improperly cast a doubt as to the credibility of the

Petitioner, in violation of the Fourteenth Amendment of the United States Constitution?

5. Whether Title 13-A-5-49 Code of Alabama 1975 is unconstitutional in that it specifically allows the same fact as an aggravating circumstance and as an element of the crime, in violation of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution?

6. Whether the death penalty was properly imposed in that the State failed to show that the killing involved was especially heinous, atrocious, or cruel, in violation of the Eighth and Fourteenth Amendments of the United States Constitution?

OPINION BELOW

The Supreme Court of Alabama, in an order dated September 12, 1986, denied Petitioner's request for hearing and let stand its decision, dated and filed July 25, 1986, which affirmed the judgment of the Circuit Court of Calhoun County, Alabama, sentencing the Petitioner to death. These opinions are appended.

JURISDICTION

The order of the Supreme Court of Alabama denying rehearing was entered on September 12, 1986. A timely request for an extension of time to file a petition for a writ of certiorari was served on October 31, 1986, and such application was granted by Justice Powell on November 6, 1986, thereby extending the time for filing to and including December 11, 1896. The jurisdiction of this Court in invoked pursuant to 28 U.S.C. sec. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involved the Fourth Amendment of the United States Constitution which, in relevant part, states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;

and the Fifth Amendment of the United States Constitution, which in relevant part, states:

> Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ...nor be deprived of life, liberty, or property, without due process of law...;

and the Sixth Amendment of the United States Constitution, which in relevant part, states:

> In all criminal prosecutions, the accused shall ...have the Assistance of Counsel for his defence;

and the Eighth Amendment of the United States Constitution, which in relevant part, states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment of the United States Constitution, which in relevant part, states:

> ...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings

The Petitioner, DANNY JOE BRADLEY, was indicted on March 22, 1983, in a four count indictment, all counts alleging capital murder. Petitioner was charged with strangling to death his twelve year old step-daughter, Rhonda Hardin, during the course of sexual activity. Count I involved forcible rape; Count II involved the rape of a minor; Count III involved forcible sodomy; and Count IV involved sodomy of a minor. After pre-trial hearings concerning discovery and suppression, the case was called for trial on July 11, 1983. Petitioner's demurrers to the indictment and motions to suppress were overruled at that time. After a four day trial, the

Petitioner was convicted under counts I and III of the indictment, and the jury recommended a sentence of death. The trial judge sentenced the Petitioner to death on August 5, 1983. Petitioner filed a motion for a new trial based upon newly discovered evidence. Petitioner claimed that the prosecution had withheld evidence that another person had confessed to the crime for which the Petitioner was convicted. A hearing was held on October 27, 1983, and continued until January 3, 1984. Petitioner's motion was denied by the trial Court on January 26, 1984. Petitioner appealed to the Alabama Court of Criminal Appeals, which Court affirmed the Petitioner's conviction in an opinion issued on November 26, 1985. Rehearing was denied on January 7, 1986. Certiorari was granted by the Supreme Court of Alabama, and on July 25, 1986, the Supreme Court of Alabama rendered an opinion affirming the decision of the Alabama Court of Criminal Appeals. The Alabama Supreme Court split 5 - 4 on the issue of whether the Petitioner should be granted a new trial based upon the Prosecution's failure to disclose the aforementioned exculpatory material to the Petitioner. The decision affirming Petitioner's conviction was a one page per curiam decision of five justices of that court. Justice Jones wrote a ten page dissent which was concurred with by three other justices which would have reversed the conviction and remanded the case for a new trial. Petitioner applied for a rehearing before the Alabama Supreme Court, which application was denied in an order dated September 12, 1986. By order dated November 6, 1986, Justice Powell extended the Petitioner's time to file a petition for a writ of certiorari to and including December 11, 1986.

B. Facts Relevant to the Questions Presented

1. Petitioner's motion for a new trial based upon newly discovered evidence that the state withheld exculpatory material, namely that a third person had confessed to the crime for which Petitioner was convicted.

In his pretrial discovery motion, the Petitioner requested of the prosecution:

> "D. Any and all statements, notes, or memorandums of conversations taken when any of the following names were mentioned as suspects or possible suspects: Phil Manis, Robert Roland, Ricky McBrayer, Jimmy Isaac, Johnny Bishop, Diane Mobley, Donald Roberts, Keith Sanford, Philip Bass, Bill Goodwin, and Charlie Grissom."

The trial court granted this motion, but the records and documents turned over to Petitioner's counsel contain no reference to any confession or statement or statement of any party admitting guilt.

After conviction, Petitioner filed a written motion for a new trial and a hearing was held on October 27, 1983, and continued on January 3, 1984. Petitioner's motion for a new trial was denied by the trial court on January 26, 1984. At this hearing, the defense presented the testimony of Glenn "Coffee" Burns that two or three days after the murder, an individual named Ricky McBrayer, one of the individuals named in the discovery demand, told him that he had been with the girl on the night of the murder and that he had accidently killed her. Burns informed the police chief of this statement the day after it was made. The State called the police chief, David Amberson, and he confirmed that Mr. Burns had informed

him of McBrayer's confession to the killing, that he had not turned this information over to the District Attorney, and that this information, if true, would exculpate the Petitioner. The State later called Detective Charles Brown who testified that he had a discussion with Petitioner's attorneys prior to the trial concerning Ricky McBrayer, but that he could not recall giving them the name of Glenn "Coffee" Burns and that in the conversation with the defense attorneys, they were told that the report of McBrayer's confession was not true.

This issue was raised by the Petitioner in his briefs before the Alabama Court of Criminal Appeals and the Supreme Court of Alabama.

2. Did the prosecution infringe upon the Petitioner's constitutional right to remain silent by questioning the Petitioner about why he remained silent while in jail awaiting trial and by further commenting upon this silence in closing argument?

The facts of this case reveal that on January 25, 1983, one day after the murder of Petitioner's step-daughter, Rhonda Hardin, the Petitioner was taken into custody, given Miranda Warnings, then questioned. The Alabama Court of Criminal Appeals held that this constitued an illegal arrest. This finding was not questioned by the Supreme Court of Alabama. On March 22, 1983, the Petitioner was indicted. On April 6, 1983, the Petitioner was appointed counsel to represent him. The Petitioner was advised to make no statements about the case without counsel being present. During the cross-examination of the Petitioner at trial, the following exchange occurred:

Q--"I'm sure. And so, what you did then, I guess, is since you didn't tell Ricky Doyle that night the truth, you made some immediate effort to get in touch with the police officers sometime during this three and a half months, say, lHey, wait a minute. I'm looking at the electric chair, and I want to get myself out of this fix. I want to tell you the truth about what happened that night."

MR BROOKS: I want to object, and approach the bench.

Q--Did you ever attempt to get in touch with them?

MR BROOKS: and get outside the presence of the Jury before he answers that question.

THE COURT: I've got an objection and a request that the Court determine a legal issue outside the presence of the Jury. I'll instruct the Jury to follow the same instructions you have had before while you are out of the Jury box. We'll be calling you back shortly.

THE COURT: Let the record show that the Jury is out of the courtroom

MR. BROOKS: Judge, I have two motions to make at this time. First, is to object to any questions along the lines of what he didn't tell the police after the point in time that he was appointed counsel, charged with this crime. He's got an absolute right at that point to remain silent. These very questions are making comments upon the exercise of that right, which, frankly, he was told to by us. And by these questions and these insinuations, he's making an implication from the exercise of his constitutional rights not to talk. We would object strongly to any questions along those lines and more for a mistrial at this point.

THE COURT: Mr Field, do you wish to comment:

MR. FIELD: Your Honor, I didn't put this man on the witness stand, but he has seen fit to testify with or without the advice of his attorneys. I don't know who advised him and I don't care. I'm allowed the same leeway of cross-examining him as I am of any other witnesses. And when he takes the stand, he takes it voluntarily. He waives any rights he has regarding any statement or any cross-examination. And just for, you know, Mr. Brooks' benefit so we can get this out now, I intend to ask him as many questions as I can to find out why he didn't tell anybody his story that he came up with on July the 4th until July the 4th. And I believe I've got a right to dothat. I've got a right to impeach him like I would any other witness. I'm sure it would be nice if they could put him on the stand and have him tell this

fairy tale, and then not give me the right to cross examine him, but that's not the way the ballgame works. They put him on, and now he's mine. And I intend to use him every way I can...
Q--I'm not talking about necessarily at that point, but at anytime, to anybody. Is that the reason you didn't mention it?
A--Is what the reason I didn't mention it?
Q--The reason that you put in here in your own writing--Let me read it to you--
A--I remember very well what I wrote in the letter.
Q--The only reason I haven't said anything before is I knew I was innocent and didn't want Mr. Wood to know because I was scared he would revoke my probation.
A--Right.
Q--That's why you didnt't say anything before this letter:
A--I didn't tell Officer Doyle.
Q--I'm not talking about Officer Doyle. I'm talking about anybody.
A--My lawyers had instructed me not to talk to anybody about the case without their presence."

During the State's closing argument, Mr. Field made the following comment concerning the post-arrest silence:

"MR. FIELD: If you believe he sat up there in that county jail from March the 22nd until July the 4th, and not even told his lawyers--
MR. BROOKS: Judge, object to that on the same grounds as stated earlier. He has a constitutional right not to talk, and he can't comment on the exercise of that right.
MR. FIELD: They introduced into evidence his letter--that's what he said in the letter, I have not told my lawyers. And I would like the court to keep up with my time, so everytime Mr. Brooks gets up and makes one of these--
THE COURT: Let me make sure the Jury understands, of course, that it would be improper in argument for a comment to be made on the fact that an accused exercised those legal rights give to each of us under the constitution of the United States or under the constitution or law of the State of Alabama. You have evidence before you and Mr. Field has the right to comment on the evidence that is before you. With that, I overrule the objection."

The letter referred to was sent by the Petitioner to his wife, and which was introduced in evidence by the State, not the defense, stated in part:

> "I guess it's time for me to tell you what I couldn't Sunday. But I want you to know it has hurt me deeply to keep it inside. I haven't told my lawyers yet. I have asked God what to do and the thought has always come back saying tell the truth. The only reason I haven't said anything before is I knew I was innocent and didn't want Mr. Woods to know becuause I was scared he would revoke my probation. But I have lived with it long enough. I did leave the house that night. I am so sorry I did. Can you ever forgive me. I didn't know such a horrible thing could ever happen to anybody exscically (sic) us. Do you remember the people who lived beside us on hughes street? Well I went there and stole one of those little boys bicycle and went to steal a car so I could sell the motor out of it. When I got back Rhonda was gone."

The Petitioner raised this issue in his briefs before the Alabama Court of Criminal Appeals and the Supreme Court of Alabama.

3. Petitioner's challenge to the admissibility of evidence obtained through Petitioner's signing a consent to search form while he was illegally arrested.

A pretrial hearing for the supression of evidence was held in this case. At this hearing, it came out that on January 25, 1983, the body of Petitioner's step-daughter, Rhonda Hardin was found on McKee Street in Piedmont, Alabama. Within an hour and a half of the discovery, the Piedmont Police arrived at the Petitioner's home. The Petitioner testified at the pre-trial hearing that he knew the two plain clothes officers that approached him and that one of the officers told him that he was under arrest for suspicion of murder. The Petitioner was handcuffed, placed in a police vehicle, and transported to the Piedmont Police Department. After being detained for approximately an hour

and a half, the Petitioner executed a consent to search form authorizing the police to search his apartment and automobile. The consent form was signed after the Petitioner was informed that he would be held by the police until he decided to cooperate. The Petitioner also consented to give body samples. The Petitioner was released from police custody some 20 to 24 hours later. During this time, Petitioner was transported, by the police, to and from Birmingham. During this time a warrantless search of the Petitioner's apartment and automobile was conducted, and several items of physical evidence were seized. The trial court denied Petitioner's motion to supress, and allowed into evidence the items seized, including a light-switch cover plate, a blue towel, hairs, and fibers from the Petitioner's automobile. This evidence was tested and eventually compared with items of evidence taken from the Petitioner and the victim. This evidence was admitted at trial and the State'sforensic expert gave testimony concerning fiber and hair evidence which tended to connect the Petitioner with the crime. During this testimony, at trial, Petitioner maintained a continuing objection.

The Petitioner raised this issue before the Alabama Court of Criminal appeals. In its opinion, that court held that the Petitioner was under arrest on January 25, 1983; that the arrest was illegal; that the consent form was voluntary under Fifth Amendment standards. However, that court held that the consent to search form was not the

product of Petitioner's arrest. Petitioner raised this issue in his briefs before the Supreme Court of Alabama.

4. The Petitioner was deprived of a fair trial by the Trial Court's questioning of Petitioner in a manner that could be construed by the jury as casting doubt on the credibility of the Petitioner.

In the trial of this case, the Trial Court propounded the following questions to the Petitioner:

Q--"Well, when were you going then to notify your wife, you wanted to get to her, why didn't you think about--why didn't you use this bicycle to ride to the hospital?
A--I didn't think about the bicycle. I was upset because my step-daughter wasn't at home.
Q--You had ridden all the way out the highway and then back?
Q--Yes, sir.
Q--Just three or four--two or three blocks from your house?
A--Yes, sir.
Q--And that you didn't think about it being there?
A--No, sir."

A motion for mistrial was made at the conclusion of the Judge's questioning on the grounds that the questions were an improper comment by the Court and cast doubt on the credibility of the witness.

The Petitioner raised this issue in his briefs before the Alabama Court of Criminal Appeals and the Supreme Court of Alabama.

5. Petitioner's challenge to the constitutionality of section 13-A-5-50, Code of Alabama, 1975.

The Petitioner was convicted under two counts of murder. The first count (Count I) was the causing of the Death of Rhonda Hardin while the Petitioner was engaging or attempting the engage in

sexual intercourse by forcible compulsion in violation of section 13 A-5-40(a)(3) of the Code of Alabama. The second count (Count III) was a violation under the same statute and was identical to the first count except that devious sexual intercourse was alleged in place of sexual intercourse.

Section 13 A-5-50, Code of Alabama, 1975, reads as follows:

> "The fact that a particular capital offense as defined in section 13 A-5-40 (a) necessarily includes one or more aggravating circumstances as specified in Section 13-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. On or by a way of illustration and not limitation, the aggravating circumstance specified in Section 13 A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of Section 13 A-5-40.

The petitioner objected, at trial, to the Court's instructions to the Jury. The Petitioner raised this issue in his briefs before the Alabama Court of Criminal Appeals and the Supreme Court of Alabama.

6. Petitioner's contention that the State did not carry its burden of proving that this capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.

Section 13 A-5-49(a) requires that before the death penalty can be imposed in Alabama, that the trial court must find that "the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses." After the Trial Jury recommended the death penalty, the Petitioner moved the Trial Court for a sentence of life without parole. This motion was denied.

This issue was raised in Petitioner's briefs before the Alabama Court of Criminal Appeals and the Supreme Court of Alabama.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER WAS DEPRIVED OF A FAIR TRIAL BECAUSE OF THE PROSECUTIONS FAILURE, IN DIRECT CONTRAVENTION OF A COURT ORDER, TO INFORM THE PETITIONER THAT THERE WAS EVIDENCE THAT ANOTHER PERSON HAD CONFESSED TO THE CRIME FOR WHICH THE PETITIONER WAS ON TRIAL.

This indigent Petitioner was represented at trial by counsel assigned by the court. In the pre-trial proceedings, the Petitioner demanded, and received a court order compelling the prosecution to turn over information regarding several people, including one Ricky McBrayer. No such information was provided to defense counsel by the prosecution. After Petitioner's conviction, it came to the attention of defense counsel that Ricky McBrayer had reportedly confessed to the very murder for which the Petitioner had just been convicted. This confession was made to one Glenn "Coffee" Burns. A post-conviction hearing was held on Petitioner's demand for a new trial. At the hearing, it was shown that the District Attorney gave defense counsel no information whatsoever concerning Ricky McBrayer's confession. There was testimony that police officers told defense counsel that there was a report that McBrayer has confessed, but that police investigation shows that there was no confession and that the report of the confession was without grounds. It further came out at this hearing that the police officers did not supply defense counsel with the name of the person to whom Ricky McBrayer had allegedly confessed.

The Petitioner does not contend that this lack of disclosure was intentional prosecutorial misconduct, however, the lack of bad

faith on the part of the prosecution is not relevant when the non-disclosed evidence is material to the guilt or punishment of a defendant Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963). Evidence of a third party's confession is of a nature that should be disclosed and would meet the criteria for a Brady violation; i.e. (1) the prosecution supressed the evidence, (2) the evidence was of a favorable character to the defense, and (3) the evidence was material. Sellers v. Estelle, 651 F. 2d 1074, (5th Cir., 1981), Cert. den., 455 U.S. 927, 102 S. Ct. 1292, 71 L.Ed. 2d 2d 472 (1982). "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." U.S. v. Agurs, 427 U.S. 97, 106, 96 S. Ct. 2392, 2399, 49 L.Ed. 2d 342, 351 (1976). In the instant case, there is no question that the District Attorney did not respond to this particular specific request. The information given to defense counsel outside the legal proceedings, in no way cures the District Attorney's omission, but rather reinforces it. When defense counsel inquired of the police as to any alleged involvement by Ricky McBrayer, the police told them that although there was a report that McBrayer had confessed, this report was not true. In giving this information to defense counsel, the police withheld the name of the person to whom McBrayer had allegedly confessed. By doing this, the police effectively foreclosed defense counsel's ability to investigate this lead on his own. Given the limited resources of an indigent criminal defendant, and given that the police, as well as the prosecutor, are under an obligations to disclose exculpatory evidence, defense counsel was completely

justified in not pursuing the McBrayer connection when he was told by the police that the report of McBrayer's confession was untrue. This action by the police effectively made McBrayer unavailable to the defense. The failure to disclose the name of the person to whom McBrayer confessed, Glenn "Coffee" Burns, made him completely unavailable to the defense. Where a witness is made unavailable due to action by the prosecution, the Brady rule applies if there is a reasonable likelihood that the testimony of the witness could have affected the judgment of the jury. U.S. v. Valenzuela-Bernal, 458 U.S. 858, 874, 102 S. Ct. 3430, 3450, 73 L.Ed. 2d 1193, 1207 (1982) (witness made unavailable due to deportation). The misleading statement by the police that there was no report of a confession by McBrayer was reinforced by the prosecution's failure to provide any information regarding McBrayer in response to the discovery order.

The evidence which convicted the Petitioner was entirely circumstantial (see page 37 of Opinion of Alabama Court of Criminal Appeals). The Petitioner testified in his own behalf and denied having been involved in the crime. Given these circumstances, any evidence which would tend to accuse another person of the crime would be of extreme importance and could have created a reasonable doubt in the minds of the jury.

> "...if the omitted evidence creates a reasonable doubt that did not otherwise exist, Constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record."

U.S. v. Agurs, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402, 49 L.Ed. 2d

342, 355 (1976). Bradu applies where "the Constitutional claim advanced ... calls into question the accuracy of the determination of ... guilt". Murray v.Carrier, 54 U.S.L.W. 4820, 4825 (1986) (Concurring opinion of J. Stevens). Bradu requires disclosure of all material that is both favorable to the accused and material to either guilt or punishment. U.S. v. Bagley, 53 U.S.L.W. 5084 (1985).

In Bagley, the prosecution failed to disclose that an agreement existed between the government and prosecution witnesses. The failure to provide this information hampered the defense in attacking the credibility of the witnesses. The District Court, acting as trier of fact, found that this non-disclosure although a Bradu violation, was harmless error. The specific holding in that case can be distinguished from the instant case, in that the non-disclosed information was directly relevant to the credibility of the witnesses, while the non-disclosed information in the instant case is directly relevant to the guilt or innocence of the Petitioner. Furthermore, in Bagley, the District Court Judge was the trier of fact, and was in the position to determine whether or not this non-disclosure was harmless error. In the instant case, the Petitioner was convicted by a jury.

In his dissenting opinion in the Bagley case, Justice Marshall recognizes that the rule of Bradu and its progeny:

> "...stems in part from the frequently considerable imbalance in resources between most criminal defendants and most prosecutors' offices. Many, perhaps most, criminal defendants in the United States are represented by appointed counsel, who

> often are paid minimal wages and operate on shoestring budgets... This grim reality, of course, poses a direct challenge to the traditional model of the adversary criminal process."

Bagley, supra at 53 U.S.L.W. 5091.

In the instant case, the indigent Petitioner had limited resources of investigation. Counsel for Petitioner had an inkling that McBrayer was one of several individuals who might have been involved in the crime. He made a specific request for information regarding McBrayer and these other individuals. The police had information to indicate that McBrayer may have confessed to the crime. They failed to tell defense counsel that the confession indeed had been reported and further failed to give the name of the person who had reported it to them. No report of this confession was ever reduced to writing, and supplied to the prosecutor by the police. Therefore, when the prosecutor failed to give defense counsel the information regarding McBrayer, defense counsel was justified in assuming that the McBrayer connection was a dead end. The facts later brought out at the post-conviction hearing clearly demonstrated that a few days after the murder, that Glenn "Coffee" Burns had told the police that Ricky McBrayer had confessed, and that the police misled defense counsel by telling them that the report of the confession was not true, thereby failing to give defense counsel the name of the witness who actually claimed to hear the confession.

In the courts below, apparently there was some confusion as to whether or not the police told defense counsel that the confession was not true or whether they told defense counsel that

the report of the confession was not true. In the dissenting opinion n the Supreme Court of Alabama, Justice Jones carefully and fully dealt with this issue. The testimony by Sgt. Brown at the post-conviction hearing which clearly resolves that issue. In response to a question Sgt. Brown stated "We made a determination that the report made to us was without grounds. It wasn't true." (See dissenting opinion of Justice Jones, page 6). That opinion goes on to show that at the time that Sgt. Brown told defense counsel that the report of McBrayer's confession was not true, that he knew that the source that the report was true and that he knew the source of the report.

II. THE PROSECUTORS' QUESTIONS TO THE PETITIONER ON CROSS-EXAMINATION, AND COMMENTS IN SUMMATION CONCERNING PETITIONER'S POST-ARREST SILENCE, IMPERMISSIBLY CAST ASPERSIONS ON PETITIONER'S CONSTITUTIONAL RIGHT TO REMAIN SILENT.

In Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 40 L.Ed. 2d 91 (1976), this court held that it would be improper for the prosecutor to comment on the post-arrest silence of a defendant. In Fletcher v. Weir, 455 U.S. 603, 102 S. Ct. 1309, 71 L.Ed. 2d 490 (1982), this Court held that the Doyle rule doesn't apply if the post-arrest silence precedes Miranda warnings. This court recently reaffirmed its Doyle holding in Wainright v. Greenfield, 474 U.S. ____, 54 U.S.L.W. 4077 (1986), in which it was held that post-Miranda silence cannot be used to impeach an insanity defense.

This case presents a fact pattern which Petitioner believes has never been addressed by this court. The courts below held that Doyle did not apply because when the Petitioner was arrested on the

indictment on March 22, 1983, there is no evidence to show that he was given his Miranda warnings subsequently. However, the courts below did not address the issue of Petitioner's previous, illegal arrest on January 25, 1983. The record is clear that the Petitioner was given Miranda warnings at that time. This case presents the question of whether the Doyle rule can be circumvented by the police releasing a suspect, then rearresting and not Mirandizing him. The courts below also claimed that the prosecutor's questions and comments were proper under Anderson v. Charles, 447 U.S. 447 U.S. 404, 10 S. Ct. 2180, 65 L.Ed. 2d 222 (1980). Anderson held that Doyle does not apply when the cross-examination inquires into prior inconsistent statements. The record shows that the Petitioner did make inconsistent statements. On the night of his step-daughter's disappearance, he told the police that he was home all night, fell asleep, and when he woke, his step-daughter was gone. In a letter written to his wife, shortly before the the trial, Petitioner admitted that this statement was not entirely true, that he left the house for a period of time that night, and upon returning found that his step-daughter was missing. It was proper, at trial, for the prosecutor to cross-examine the Petitioner as to these two inconsistent statements. However, the prosecutor went further than that. In addition to pointing out the discrepancy between the two statements, the prosecutor asked the Petitioner why he remained silent in jail after his arrest on the indictment. This was clearly not a comment upon an inconsistent statement, but a comment upon Petitioner's right to remain silent. Petitioner answered this

question by stating that his attorneys had advised him to remain silent. Despite this answer, the trial court allowed the prosecutor to comment upon Petitioner's post arrest silence in closing argument, over objection of defense counsel. This was clearly in violation of Doyle, and did not fall within either the Fletcher or Anderson exceptions.

III. THE EVIDENCE OBTAINED BY THE POLICE ON JANUARY 25, 1983 WAS OBTAINED AFTER PETITIONER'S ILLEGAL ARREST, AND SUCH EVIDENCE WAS THE DIRECT RESULT OF THAT ILLEGAL ARREST AND SHOULD HAVE BEEN SUPRESSED.

This court has consistently held that evidence obtained after an illegal arrest or seizure must be supressed as the fruit of the illegal detention. Hayes v. Florida, ____ U.S. ____, 105 S. Ct. 1643, 84 L.Ed. 2d 705 (1985); Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L.Ed. 2d 229 (1983); Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248; 66 L.Ed. 2d 824 (1979). At the pre-trial supression hearing, it was the position of the District Attorney that the Petitioner was not under arrest on January 25, 1983, and therefore evidence obtained either directly from the Petitioner, or through the consent to search form, was properly admissible. In his argument, the District Attorney admitted:

"MR. FIELD: Yes, sir. Your Honor, I don't think there's any dispute as to the law and if, in fact, the Piedmont police arrested this Defendant on the occasion complained about, they did so without probable cause and the fruits of any search or any evidence obtained after that would be bad. So, there's not a dispute as to the law."

On appeal to the Alabama Court of Criminal Appeals, that Court held that the Petitioner was in fact under arrest on January

25, 1983, that such arrest was without probable cause and therefore illegal. However, that court went on the hold that the evidence supplied by the Petitioner and the consent to search form was signed voluntarily for Fifth Amendment purposes. That court then went on to hold that the evidence obtained was some how properly attenuated from the illegal arrest.

The reasoning of the Alabama Court of Criminal Appeals is inconsistent with the facts of this case. The facts show that the Petitioner was arrested in front of his house at approximately 9 a.m. He was handcuffed, placed in a police car, and taken to the police station. After arriving at the police station, he was constantly questioned by both the local police and by the state police. At 11:08 a.m., the consent to search form was signed. When consent is obtained after an illegal arrest, the government must establish a break in the causal connection between the illegality and the evidence thereby obtained. Dunaway, supra, 442 U.S. at 217-18, 99 S. Ct. at 2259-60, 60 L. Ed. 2d at 839. There is no evidence presented by the prosecution which established such a break. The court below relied upon the fact that the Petitioner had initially contacted the police the night before to report his step-daughter missing, and that he was playing the part of the aggrieved parent and cooperating with the police so that his step-daughter would be found. This reasoning is illogical because the break necessary to attenuate the evidence obtained from the illegal arrest must occur after the arrest, not before it. The Petitioner's cooperation with the police the night before cannot be equated with the evidence that was obtained from him the next day

during his illegal arrest. On the night of his step-daughter's disappearance, the Petitioner was cooperating with the police so that they may find his step-daughter. The Petitioner's illegal arrest came after the girl's body had been found so that the previous night's cooperation would logically come to an end. In asking the Petitioner to submit body samples, and to submit to a search of his home and car, the police were asking the Petitioner to aid them in their investigation against him. This is not the act of an aggrieved parent, but rather the act of a person in police custody attempting to please the police so that they will let him go. This was exactly Petitioner's testimony at the supression hearing.

IV. THE QUESTIONING OF THE PETITIONER BY THE TRIAL JUDGE WAS SUCH THAT IT SHOWED THE JURY THAT PETITIONER'S TESTIMONY WAS NOT BELIEVED BY THE TRIAL JUDGE THUS DEPRIVING PETITIONER OF A FAIR TRIAL.

The trial judge chose to question the Petitioner in an area of utmost significance. Petitioner initially told the police that he was home all night when his step-daughter disappeared. In the subsequent letter to his wife, the Petitioner said that he went out of the house, stole a bicycle, for the purposes of driving to an automobile that he intended to steal. He testified that the did not steal the automobile, but returned the bicycle to where he found it and then returned home. He further testified that on finding his step-daughter missing, he contacted a neighbor. Since neither Petitioner nor his neighbor had any gasoline in their cars, the Petitioner testified that he walked to the various places he went to that evening, including the hospital, the police station,

and relatives' houses. Upon cross examination, the District Attorney attempted to show that this story was a recent fabrication. After cross-examination, the trial judge questioned the Petitioner as to why the Petitioner didn't again use the bicycle to visit his wife at the hospital. When Petitioner answered that he didn't think about the bicycle because he was upset that his step-daughter was missing, the trial judge continued to question the Petitioner about why he didn't think about using the bicycle.

This line of questioning clearly shows that the trial judge was having difficulty believing Petitioner's testimony about the bicycle. This certainly would have been proper area of inquiry for the District Attorney, but not for a trial judge who must appear to be scrupulously impartial. Furthermore, the implications of the trial judge's questions are astounding. The questions of the trial judge imply that the Petitioner should have returned to the place where he had first stolen the bicycle, stolen it a second time, and used it not only to visit his wife at the hospital, but to ride it to the police station to report that his step-daughter was missing. Additionally, Petitioner testified that after he found that his step-daughter was missing, he was constantly in the company of a neighbor. It would have then been necessary for the Petitioner to have stolen two bicycles to satisfy the trial court's inquiry.

The Petitioner was convicted solely on circumstantial evidence. Not only was the evidence circumstantial, it was far from conclusive. The strongest evidence against the Petitioner was the testimony of the State's seralogist, which claimed that the

person that sexually assaulted the victim had a blood type which was present in only 20% of the population, and that Petitioner fell within this category. Therefore, the credibility of the Petitioner was of the utmost importance for the jury to consider. The aspersions cast upon the Petitioner's credibility by the trial judge cannot be deemed harmless error in this case.

V. THE JURY IMPROPERLY FOUND THAT AN AGGRAVATING CIRCUMSTANCE, WARRANTING IMPOSITION OF THE DEATH PENALTY, EXISTED BECAUSE THE ALABAMA STATUTE ALLOWED THE JURY TO CONSIDER FACTS WHICH ALSO CONSTITUTED AN ELEMENT OF THE CRIME.

The evidence upon which the jury convicted the Petitioner tended to show that the victim, his step-daughter, was strangled during a sexual assault. This finding had to have been made by the jury in order for them to convict. At the sentencing phase of the verdict, the jury was instructed that it could consider, as an aggravating circumstances, that the murder was committed during a sexual assault. There was no other aggravating circumstance present. other that Petitioner had a juvenile record, and was on probation for a burglary. It is therefore obvious that the jury, in its advisory verdict, and the judge in sentencing Petitioner to death, did so solely on the basis of the fact that the killing took place during a sexual assault.

Any statute which permits the infliction of capital punishment in an arbitrary or capricious manner is violative of the Due Process clause. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 2d 346 (1972). By allowing the prosecution to use, as aggravating circumstances, the very elements of the crime itself, the prosecution is thereby relieved of its burden of

proving that the death penalty is warranted. However, by relying solely upon the elements of the crime as aggravating circumstances, the Petitioner could only have avoided the death penalty by producing substantial mitigating circumstances. This in effect shifted the burden of proof from the prosecution to the Petitioner, which this Court has held is a violation of Due Process. Sandstrom v.Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed. 2d 39 (1979). This statutory scheme deprives defendants who are charged under this statute of the opportunity of contesting that aggravating circumstances existed. Under The Alabama statutory scheme, it is not enough to sentence a defendant to death because he has been convicted of intentional murder. The prosecution must show other facts. When the Prosecution presents these facts, the defendant would have an opportunity to rebut them. However, under the statute which Petitioner stands convicted, the Petitioner cannot rebut the facts presented as aggravating circumstances, because in the guilt portion of the trial, the jury has already determined those facts. Therefore, the Alabama statutory scheme virtually assures that persons convicted under this statute will be sentenced to death in violation of the dictates of Furman.

VI. THE PETITIONER WAS IMPROPERLY SENTENCED TO DEATH BECAUSE THE FACTS DID NOT DEMONSTRATE THAT THE CAPITAL OFFENSE WAS PARTICULARLY HEINOUS, ATROCIOUS, OR CRUEL COMPARED TO OTHER CAPITAL OFFENSES.

The record in this case demonstrates that the victim was strangled to death. It also demonstrates that she had sexual relations with a male. By its verdict, the jury obviously determined that these two events were connected. The record also shows that there was no

signs of violence on the victims genital area. There was also uncontradicted testimony that the Petitioner would occasionally play with the victim, his step-daughter, and also his step-son, by putting them to sleep by choking them. The testimony showed that the children actively sought the Petitioner to do this after they saw it done on television. Therefore, the facts are as consistent with an accidental strangulation during voluntary sex as they were with a deliberate strangulation during forcible sex. There was no evidence of any physical violence to the victim other than the strangulation. There was no evidence that the victim was tortured or put through any substantial pain. There is no evidence that the Petitioner bore any ill-will toward the victim. To the contrary, all the evidence was that he was a warm and loving father. It is therefore submitted that there was no evidence whatsoever that this crime was heinous, atrocious or cruel, and therefore, the death penalty was imposed in an arbitrary and capricious manner.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Dated: December 10, 1986
Commack, New York

Respectfully Submitted,

ALAN POLSKY
Attorney for the Petitioner
DANNY JOE BRADLEY
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"A" Order of Supreme Court of Alabama denying rehearing

"B" Opinion of Supreme Court of Alabama

"C" Order of Alabama Court of Criminal Appeals denying rehearing

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"E" Order of Trial Court denying motion for new trial

"F" Judgement and sentence of death

"G" Discovery order

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OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

TELEPHONE: 261-4601

Re: 85-424
EX PARTE: DANNY JOE BRADLEY
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Danny Joe Bradley vs. State)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXXX Application for rehearing overruled. No opinion written on rehearing.
Per Curiam - Torbert, C.J., Maddox, Shores, Adams & Steagall, JJ., concur;
Jones, Almon, Beatty & Houston, JJ., dissent.

_____ Permission to file amicus curiae briefs granted

_____

9/12/85
bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama

FILED
JUL 25 1986
CLERK
SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1986

Ex parte Danny Joe Bradley

PETITION FOR WRIT OF CERTIORARI TO THE
85-424 COURT OF CRIMINAL APPEALS

(Re: Danny Joe Bradley
v.
State of Alabama)

PER CURIAM.

This is a death penalty case. Pursuant to statutory mandate (Code 1975, § 13A-5-53) and the rules of this Court (Rule 39, A.R.A.P.), we granted Defendant's petition for review of the Court of Criminal Appeals' affirmance of his conviction and sentence. For a detailed statement of the facts, as well as an at-length treatment of each of nine separate issues, see Bradley v. State, [Ms. 7 Div. 275, Jan. 17, 1986] ___ So. 2d ___ (Ala.Crim.App. 1986). After careful review of the entire record of trial, and the Court of Criminal Appeals' opinion, along with the briefs and argument of able and experienced counsel, we are constrained to affirm the Court of Criminal Appeals' judgment upholding the conviction and sentence of death.

AFFIRMED.

Torbert, C. J., and Maddox,* Shores, Adams, and Steagall, JJ., concur.

Jones, Almon, Beatty, and Houston, JJ., dissent.

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*Although Maddox, J., did not sit in oral arguments, he has listened to the tape of oral arguments and studied the briefs.

85-424

JONES, JUSTICE (dissenting).

I agree with the Court of Criminal Appeals' opinion on each of the issues addressed therein except one: the failure of the State to make a full disclosure of information known to it pertaining to the report of an alleged confession to the crime made to the investigating police officer by a third party.

The Court of Criminal Appeals' treatment of this issue is contained in Part IV of its opinion. Defendant's counsel address this issue in their brief as follows:

> "Appellant does not find fault with the citation of authority used by the Court of Appeals in its decision. Appellant submits, however, the lower court erred in its application of the facts of the case to the law.
>
> "The court found that the State, through Detective Sergeant Brown, had informed defense counsel that Ricky McBrayer had in fact confessed, but that it had been investigated and found to be without grounds and not true. This is not what the facts revealed, and an examination of the record shows that Sergeant Brown's testimony was that he informed counsel of an alleged confession and that the report of the confession, not the confession, was without grounds and not true. What was disclosed to defense counsel indicated that (1) there was no confession, (2) the report of the confession was without grounds, and (3) no disclosure was made that Glenn 'Coffee' Burns was the person to whom the confession had been made. While appellant submits that the lack of disclosure was not intentional prosecutorial misconduct, the evidence not disclosed was material to the guilt or punishment of the appellant, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U. S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence of a third party's confession is of a nature that should be disclosed and would meet the criteria for a Brady violation, i.e., (1) the prosecution suppressed the evidence, (2) the evidence was of a favorable character to the defense, and (3) the evidence was material. Sellers v. Estelle, 651 F. 2d 1074 (5th Cir. 1981), cert. den., 455 U.S. 927, 102 S.Ct. 1292, 71 L. Ed. 2d 472 (1982); Knight v. State, 478 So. 2d 332 (Ala.Cr.App. 1985). The evidence suppressed was of a material nature and there certainly is a reasonable possibility that its disclosure would have affected the result of the proceeding. The evidence in this case was entirely circumstantial, as noted by the Court of Criminal Appeals.
>
> "The name of Ricky McBrayer was known to the defense and was the subject of a Motion for Discovery and the subject of their interview with Sgt. Brown. But, again, it must be emphasized

> that the interview did not reveal that McBrayer had confessed, nor that he had confessed to Glenn Burns. In fact, the context of the interview had the effect of closing the door on further inquiry concerning McBrayer's confession, since Sgt. Brown had indicated that the report of the confession had been found to be untrue. The nature of the evidence suppressed was clearly exculpatory in character and material to the guilt or punishment of the Appellant. The failure of the State to disclose it to the defense rendered a fair trial impossible and a constitutional violation inevitable. The evidence would have created a reasonable doubt as to Appellant's guilt, regardless of whether or not it was trustworthy or admissible. ... State v. Kimberly, 463 So. 2d 1109 (Ala. 1984).
>
> "Appellant also would find error in the lower court's opinion wherein it held that the State's duty to disclose McBrayer's confession did not include the duty to disclose the person to whom the confession was made. Appellant submits that even assuming that the facts were as found by the Court of Appeals, the State would be required under Brady and its progeny to fully disclose the exculpatory evidence." (Emphasis in the original.)

Because the Court of Criminal Appeals' factual statement is placed in issue, I have studied the record for a better understanding of the precise context of Defendant's "newly discovered evidence" ground for a new trial. Initially, I observed that the record of all pre-trial proceedings, as well as the record of trial, is totally silent as to any purported or alleged confession to the crime by any third party. To be sure, as indicated in Defendant's brief, his pre-trial discovery motion, inter alia, requests of the State:

> "D. Any and all statements, notes or memorandums of conversations taken when any of the following names were mentioned as suspects or possible suspects: Phil Manis, Robert Roland, Ricky McBrayer, Jimmy Isaac, Johnny Bishop, Diane Mobley, Donald Roberts, Keith Sanford, Phillip Bass, Bill Goodwin and Charlie Grissom."

The trial court granted the motion pursuant to Rule 18, Temporary Rules of Criminal Procedure, but the records and documents turned over to Defendant's counsel contained no reference to any confession or statement by another party admitting guilt. Other than Item D of Defendant's discovery

motion, containing the name of Ricky McBrayer as a "possible" suspect, the only mention of a third-party confession, including any knowledge thereof on the part of Defendant's counsel, was adduced in an evidentiary hearing on the Defendant's post-judgment motion for a new trial.

Although certain of the testimony at this hearing is not altogether clear and although there are unfilled gaps in the entire sequence of events, I was able to piece together the following scenario: About four days following Rhonda's death, a private citizen, Glenn Burns, accompanied by another private citizen, Fred Baker, reported to Chief of Police Amberson, that he and Ricky McBrayer had met at a bar in Piedmont the third night after Rhonda's death; that, after leaving the bar and while riding in Burns's car, McBrayer told him he had been with Rhonda the night of her death, and that he had accidentally killed her.

According to the post-conviction testimony of the then-former Chief Amberson, he related this information to certain members of the investigative team, who subsequently reported back to him that they were "able through investigation to locate the whereabouts of McBrayer on the night this girl was killed"; and, from their investigation, they concluded that McBrayer was not involved. Neither Amberson nor any other members of the investigative team made any notes or records of either Burns's statement or any of the follow-up investigation or conclusions made therefrom. Nor did he or anyone else to his knowledge inform either the prosecution or the defense counsel of any of these events, conversations, or conclusions; thus, the records and documents released to Defendant's counsel in response to the court's discovery order contained no such information.

Several days before the hearing on the new trial motion, Burns again reported to Piedmont's present Police

Chief, Ricky Doyle, the circumstances of McBrayer's "confession." The reason for his second visit, according to Burns, was "[b]ecause [McBrayer] told down at the service station he was going to get me for going around saying he killed the girl." On cross-examination by Defendant's counsel, Burns reiterated that his reason for his second visit to the police station was that he indirectly received a threat from Ricky McBrayer that, if "[I] came down here and testified, he [McBrayer] was going to kill [me]."

The only testimony taken at the first phase of the post-conviction hearing was that of Glenn Burns and former Chief Amberson.[1] It is obvious from his vigorous cross-examination of Burns that the district attorney did not know the source of defense counsel's information concerning Burns's report to the police relating McBrayer's alleged confession. Despite repeated questions from the district attorney seeking a contrary reply, Burns stood fast to his simple unequivocal statement, both as to McBrayer's admission of the crime and that he (Burns) had not given this information to Defendant, Defendant's counsel, or any mber of Defendant's family.

Apparently satisfied with Burns's explanation, the district attorney then requested a continuance:

> "MR. FIELD: Judge, we have misplaced some information that we had in regard to this case, and it may be of evidentiary value in this particular proceeding. If we find that information, would we have the opportunity to go ahead, and assuming it's relevant and legal evidence, submit it sometime say no later than--
>
> "THE COURT: --Let me ask this. Are you asking the Court in effect to carry this hearing over on the motion for new trial?
>
> "MR. FIELD: Yes, sir; yes, sir, I guess I am."

Thereupon, the motion for continuance was granted from October 27, 1983, to January 3, 1984, at which time the State called, as its only remaining witness, Detective

Sgt. Charles Brown, who had participated in the investigation of Rhonda's death and in the arrest of Defendant.

After establishing, through a series of preliminary questions and answers, that, during the course of his investigation, he had received "some information that Ricky McBrayer was supposed to have confessed to this particular crime," Sgt. Brown stated that, before the trial of the case, he told defense counsel "what he had learned in regard to Mr. McBrayer's alleged confession." The crucial part of his testimony is contained in the following questions and answers:

> "Q Did you have the occasion to relay to [defense counsel] any information in regard to the alleged confession by Mr. McBrayer?
>
> "A Yes, sir.
>
> "Q And did you tell them the results of the investigation into that particular alleged confession?
>
> "A Yes, sir.
>
> "Q Did you inform them as to the contents that you knew at that time of the alleged confession of Mr. Ricky McBrayer?
>
> "A I shared with them all the information that I had available pertaining to the statements that he made, that were supposed to have been a confession.
>
> "Q All right. And do you have--did you subsequently obtain any other information in regard to that particular item?
>
> "A We made a determination that the report made to us was without grounds. It wasn't true."

He then reaffirmed: "[Except for] the source or the person that reported to us that Mr. McBrayer had made that statement ... I know that I shared the content of the statement with [defense counsel] and the fact that it had been investigated." He concluded his testimony by identifying Burns as the source of their information

regarding the alleged confession and by stating that he knew Burns's identity at the time he talked with defense counsel.

As the quoted portion of defense counsel's brief articulates, they contend that Sgt. Brown's post-conviction testimony is entirely consistent with their understanding of what they were earlier informed of by him with respect to the veracity and credibility of the report of the existence of an alleged third-party confession. It was not their understanding, say defense counsel, that it was the alleged confession that was not true; rather, they understood that Sgt. Brown had concluded from his investigation that the report of the confession was rejected as untrue.

In effect, the State counters by saying that defense counsel's argument is a mere play on words and that a fair reading of Sgt. Brown's testimony "indicates that [Defendant's] attorneys were in fact informed, prior to trial, that Ricky McBrayer had confessed to another person and that the contents of this confession were determined to be untrue."

Assuming, without deciding, that Sgt. Brown's testimony is susceptible to either interpretion, I find that a resolution of this factual issue is not essential to the ultimate resolution of the fundamental due process issue here presented: Whether the trial court erred in not granting a new trial in light of the post-conviction evidence that its pre-trial discovery order had not been complied with regarding the State's information concerning a third-party confession.

I would answer the question in the affirmative and hold, on separate and independent State grounds, that Sgt. Brown's limited disclosure to defense counsel concerning McBrayer's alleged confession did not comport with the minimum standards of due process guaranteed by Constitution of Alabama 1901, Art. I, § 6.

While, as I have stated, it is not necessary to decide between the State's and the Defendant's version of Sgt. Brown's testimony (whether it was the confession or the report of the confession that was found to be untrue), I certainly agree that the equivocal nature of this entire disclosure episode serves to demonstrate the fallacy of the State's partial disclosure argument. From the early stages of the official investigation of this crime, Ricky McBrayer was listed as one of several suspects. This fact was known to defense counsel, who included his name in their discovery motion, as detailed above. In spite of this, and the later disclosed fact of Burns's report of McBrayer's confession and the police investigation that ensued, the State's response to the court's discovery order made no mention of this potentially exculpatory matter.

The State would have this Court excuse its failure of disclosure on two grounds: 1) Because no record was made of Burns's report or the investigation triggered thereby, there was no record to turn over to Defendant's counsel; and 2) because, before trial, Sgt. Brown told Defendant's attorneys that McBrayer had allegedly admitted that he killed the girl, his failure to disclose the source of this information in no way restricted Defendant's "avenue of investigation."

Further, in response to the Defendant's alternative position that the State's failure to make a "full disclosure" violates the mandate of Brady v. Maryland, 373 U.S. 83 (1963), the State contends that "unless [the Defendant] could have gotten McBrayer himself to testify at trial, this information would have been useless as it would have been inadmissible at trial."

In my opinion, fundamental substantive due process mandates that we should reject each of these grounds. The very foundation of the rule requiring the State to disclose to the accused any exculpatory matters within its knowledge

or possession rests upon basic notions of fairness; and the application of this rule cannot be avoided by failing to record so material a matter as the report of an alleged confession of a third party. Nor can the true spirit of the rule's application be complied with by disclosure of only some of the material information, where, as here, other material aspects of the information are withheld. The requirements of due process are not met by the exercise of speculation as to whether disclosure of less than the whole of material matters adequately furnished Defendant "an avenue of investigation." By the same token, the due process test is not measured by whether the undisclosed matter is admissible evidence. For a discussion of the "materiality" requisite and its application, see Ex parte Kimberly, 463 So. 2d 1109 (Ala. 1984). Piecemeal disclosure of vital information, on a pick and choose basis, cannot be left to the discretion of the State. Indeed, the trial court's discovery order did not so provide.

To be sure, the failure of the investigating officers to record so important a piece of information as a purported third-party confession lies at the very heart of the problem. Particularly is this true where, as here, the Defendant's conviction is based solely upon circumstantial evidence. If a proper record had been made and kept of the reported confession, such a report, of necessity, would have revealed, at the very least, the source of the report, its substance, and the nature and extent of any follow-up investigation. Then, its disclosure by the State, pursuant to the trial court's discovery order, would have rendered moot any post-conviction proceeding raising the instant disclosure issue.

For the foregoing reasons, I cannot accept, as an excuse for its failure to make full disclosure, the State's response to the effect that "because it kept no

record of the report of a third-party confession, it was not in default of the court's discovery order." Furthermore, "disclosure," in this context, means full disclosure of all material matters within the knowledge or possession of the State. Indeed, under the totality of these circumstances, I cannot conclude, as a matter of law, that the source of the report of McBrayer's confession is any less material, for investigative and other material purposes, in the preparation of a defense, than the report itself.

For an excellent discussion of the duty of a private attorney/investigator in aid of prosecution to disclose all material information, see State v. Von Bulow, 475 A. 2d 995 (R.I. 1984), cert. den., ___ U.S. ___, 105 S.Ct. 233, 83 L.Ed.2d 162 (1984). Having resolved the attorney/client privilege contention adversely to the State, the Rhode Island Supreme Court addressed the full disclosure issue thusly:

> "The facts of the present case are a classic example of the impermissible selective use of privileged information. While maintaining that communications were intended to be confidential, Alex and his attorney, at Alex's direction, disclosed information sufficient to trigger an investigation by the state and an indictment. These same parties later refused to disclose other evidence of the same communications. The inequity of allowing the privilege holder in this case to disclose as much as he pleased while withholding the remainder is heightened by the fact that defendant was on trial for attempted murder. The effect of excluding such evidence was therefore to deny defendant access to information that he was entitled to examine in the preparation of his defense." 475 A.2d at 1007

Although this quoted language is in a context not here applicable (the claim of attorney/client privilege), its basic rationale, refuting the State's partial disclosure position, is equally applicable to the case at bar. For another partial disclosure case, although again in a different context, see, also, State v. Towns, 432 A. 2d 688 (R.I. 1981).

Thus, because I would hold that the constitutional due process violation prevented a fair trial, in my opinion the judgment of conviction and sentence should be reversed and this cause should be remanded to the Court of Criminal Appeals for an appropriate order remanding the cause to the circuit court for a new trial.

Almon, Beatty, and Houston, JJ., concur.

COURT OF CRIMINAL APPEALS
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MARIE JORDAN
Clerk
(205) 261-4590

7th Div. 275

CALHOUN Circuit Court
CC 83-267

DANNY JOE BRADLEY
Appellant

vs.

State of Alabama
Appellee

Dear Sir:

You are hereby notified that on January 7, 1986 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

____ Notice of Appeal filed. Future correspondence should refer to the above number.

____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____ As to briefs, see Rules 28, 31 and 32, A.R.A.P.

____ On motion, record on appeal accepted and considered as timely filed in this Court.

____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

____ Appellant granted seven (7) additional days to file reply brief. Brief due on _____.

____ Brief of Appellant filed. ____ Oral argument requested by appellant.

____ Oral argument request disallowed; appeal submitted on briefs.

____ Appeal submitted to the Court for decision in the following manner:

____ Appeal affirmed. No opinion. Judgment not final, see Rule 41, A.R.A.P.

____ Appeal dismissed. No Opinion.

____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

____ Application for rehearing filed.

XXX Application for rehearing overruled. No opinion. Judgment not final, see Rule 41, A.R.A.P.

____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

____ Appeal placed on rehearing ex mero motu.

____ Certificate of Final Judgment issued to Circuit Clerk.

XXX Rule 39(k) motion denied.

Marie Jordan
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

ORIGINAL

NOV 2 6 [illegible]

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM 1985-86

7 Div. 275

Danny Joe Bradley

v

State

Appeal from Calhoun Circuit Court

BOWEN, PRESIDING JUDGE

Danny Joe Bradley was indicted for the capital murder of Rhonda Hardin, his twelve-year-old stepdaughter. A jury convicted him of two counts of a four-count indictment: murder during a rape in the first degree and murder during a sodomy in the first

degree in violation of Alabama Code 1975, § 13A-5-40(a)(3). After a sentence hearing, the jury unanimously recommended the death penalty. Following a presentence investigation, the trial court held a sentence hearing and sentenced Bradley to death by electrocution. Bradley raises eight issues on this appeal from that conviction and sentence.

I

In sentencing Bradley to death, the trial court made written findings of facts. These findings are supported by the evidence.

> "Upon consideration of the evidence and testimony presented before the Court during the guilt phase of the trial in this cause, the Court hereby finds as follows:
>
> "Rhonda Hardin was a twelve year old female residing at 309 Barlow Street, Apartment B in Piedmont, Calhoun County, Alabama, on January 24, 1983. The family unit residing at the above address consisted of Rhonda Hardin, her younger brother, Gary 'Bubba' Hardin, Judy Bradley, the mother of Rhonda and Gary; and the Defendant, Danny Joe Bradley, Judy's husband and Rhonda's and Gary's step-father.
>
> "That on January 24th and 25th, 1983, Judy Bradley was absent from the home, having been hospitalized for some thirteen (13) days, and that the Defendant, Danny Joe Bradley, was the parental custodian of the minors, Rhonda Hardin and Bubba Hardin.
>
> "The Bradleys (Defendant, Rhonda and Gary Hardin) were visited at their apartment on the evening of January 24, 1983, by Dianne Mobley, Jimmy Issac and Johnny Bishop who left around 8:00 p.m. and Bubba Hardin retired for the evening thereafter. When Bubba retired Rhonda was asleep on the couch in the living room. Bubba testified that Rhonda had asked him to wake her up so she could sleep in her bedroom but that Danny Bradley instructed him to leave Rhonda on the couch. Bubba testified that he was later awakened at some hour by the sound of a chair being 'bumped' in the kitchen and heard the unlatching of the back door; that there were no lights on and no television sound on; that he fell

back asleep and was later awakened by Danny who informed him that Rhonda was missing. Danny Bradley then took Bubba next door.

"Bubba testified that Danny Bradley would play a game both with Rhonda and Bubba by having them think of something 'good' while Danny placed his hand on their necks and stopped the flow of blood to the brain until they were unconscious.

"Phillip Mannis resided in the adjoining duplex apartment at 309 Barlow Street and was awake watching TV until the morning hours of January 25th. At 12:50 a.m. Mannis testified that Bradley knocked on his door and stated that Rhonda Hardin was missing. Bradley told Mannis that he (Bradley) found Rhonda attempting to take some of her mother's prescription drugs; that they argued and he dozed off and on awakening found that Rhonda was gone. Mannis volunteered to help Danny Bradley find Rhonda. Danny told Mannis that he (Bradley) would first check at the house of Rhonda's grandmother (Bennett). The Defendant was gone from the Barlow Street location in his auto for ten to fifteen minutes, returned and reported to Mannis that Rhonda was not at her grandmother's house.

"Robert Roland, brother-in-law of the Defendant, testified that Danny Bradley arrived by auto at Roland's home at approximately 11:30 p.m. and asked if he had seen Rhonda. When the Defendant was told 'no' he walked a short distance to Ed Bennett's (his in-laws and the grandparents of Rhonda) returned and drove away.

"Ed Bennett testified that Danny Bradley arrived at his home 'around midnight' looking for Rhonda and upon his failure to locate her left after ten to fifteen minutes.

"Police Officer Bruce Murphy testified that he saw the Defendant in his car on North Church Street at Ladies Street at 9:30 p.m.

"Phillip Mannis testified that Danny Bradley returned to his Barlow Street apartment around 1:15 - 1:20 a.m. and stated that Rhonda was not at her grandparents (the Bennetts') and asked Mannis to go with him to the Piedmont hospital to see Judy Bradley. Because of the stated fear of little gasoline in his auto, Bradley and Mannis leave on foot to look for Rhonda at approximately

1:30 a.m. and arrive around 2:00 a.m. Bradley and Mannis wait at the hospital lobby for approximately an hour to an hour and a half, as Bradley states he fears upsetting his hospitalized wife. Finally, Mannis relates to Judy Bradley that Rhonda is missing. The two men walk to the Piedmont Police Station and report the absence of Rhonda to Piedmont Police Officer Ricky Doyal at 3:30 a.m. Danny Bradley relates to the officer that he has argued with Rhonda at their home that evening, then fell asleep, and on awakening at approximately 11.30 p.m. discovered Rhonda was missing and went to his neighbors. Mannis and Bradley then walked back to the Barlow Street duplex apartment arriving between 5:00 and 5:10 a.m.

"The body of Rhonda Hardin was discovered in a wooded area approximately ten yards off McKee Street in Piedmont, Calhoun County, Alabama, at approximately 7:00 a.m. on January 25, 1983.

"At trial, evidence and testimony was produced to the effect that Rhonda Hardin was the victim of a homicide and that the death of the said Rhonda Hardin was asphyxia due to strangulation by the application of external pressure to the neck.

"The Court, from the evidence and testimony, further finds that the body of Rhonda Hardin, bore some evidence of sexual assault and that the autopsy performed indicated the presence of human semen in the vagina, rectum, mouth and gastric content of the victim.

"The Court further finds that the Defendant, Danny Joe Bradley, was transported by the police department vehicle to the Piedmont police station on January 25, 1983, at approximately 9:30 a.m. for routine questioning as the last known person to see the victim alive. At the police station the Defendant was fully advised of his legal rights and then indicated his desire to cooperate with the legal authority. During the course of that day, the Defendant consented to a search of both the apartment at 309 Barlow Street and his automobile. The Defendant further consented to the taking of his blood and saliva samples from his person as well as fingernail scrapings and a pubic hair sample. After extensive questioning throughout the day including a trip to Birmingham, Alabama, the Defendant went home to 309 Barlow Street approximately 4:00 a.m. on January 26, 1983.

Throughout the questioning of the Defendant by Piedmont City and State Law enforcement agents, the Defendant asserted that he had remained at his home until his discovery that Rhonda Hardin was absent.

"The Court further finds, from the evidence and testimony, that the defendant made the statement in the presence of Charlie Bennett and Russell Dobbs, in substance, 'In my heart I know I done (sic) it'.

"The Court further finds, from the evidence and testimony, that the Defendant, Danny Joe Bradley, was a blood type 'O' non-secreter and that the semen found in and on the body of the victim was consistent with that which would be deposited by the Defendant. Further, the seminal fluids taken from the body of the victim are consistent with seminal stains found on the bed sheets in the Defendant's apartment and found on a blanket taken by the Defendant from the Piedmont hospital three days before the disappearance of the victim; that the hair, fiber and fingernail scrapings evidence clearly tended to connect the Defendant with the victim's clothing worn when discovered, with the bed sheets and blanket found inside Defendant's apartment the next morning, and fibers from the trunk of Defendant's automobile were consistent with fibers from the victim's red corduroy pants.

"The Court further finds, from the testimony of the Defendant, that the Defendant stated he lied to the legal authorities when he stated he did not leave his apartment on the night of January 24, 1981, until after his discovery that Rhonda Hardin was missing. At trial, the Defendant testified that he left the Barlow Street apartment around 10:30 p.m. on January 24, 1981, with the intent to steal a car, located on the other side of Piedmont, that he took a boys 20 inch bicycle from a yard on Hughes Street, pedaled to his intended location but determined that his opportunity to take the intended auto was not good, and that he pedaled back, returning home around midnight and discovered Rhonda Hardin was missing. The Defendant testified that he did not reveal this information earlier for fear of having his probation revoked."

II

Bradley argues that the consent he gave to search his house and his statements to the police were the product of his illegal arrest and that, consequently, neither the physical evidence obtained from his house nor his statements should have been admitted into evidence. The resolution of this issue involves a number of related questions.

This Court must first determine whether Bradley was arrested or whether his situation was consensual. If an arrest occurred, the legality of that arrest must be determined. If the arrest was illegal, we must decide first, whether Bradley's consent to search and statements were voluntary within the confines of the Fifth Amendment, and, if so, then whether they were the tainted product of an illegal arrest and seizure. If Bradley was illegally arrested, this Court makes two determinations. First, whether the consent to search and the statements were voluntarily given within the meaning of the Fifth Amendment to the United States Constitution. If the consent and statements were voluntarily given, this Court must then determine whether each was sufficiently an act of free will to purge the primary taint of the illegal arrest. United States v. Wellins, 654 F.2d 550, 552-53 (9th Cir. 1981).

THE FACTS

The State's evidence shows that between 8:30 and 9:30 on the morning of January 25, 1983, approximately one hour after Rhonda's body had been discovered, four law enforcement officers arrived at Bradley's residence. Piedmont Police Officer Bruce Murphy and his partner, Officer Terry Piver, were in plain clothes

and driving a pickup truck. Piedmont Police Chief David Amberson arrived with Calhoun County Deputy Sheriff Don Glass in the Deputy's official car. Bradley was to be "picked up" for questioning because he was one of "quite a few" suspects. Officer Murphy and Chief Amberson were the only officers present that morning who testified at the suppression hearing or at trial.[1] Both denied informing Bradley that he was under arrest. Chief Amberson testified that Bradley was not under arrest, was not placed under guard, and was free to leave anytime he wanted. Murphy testified that Chief Amberson was "in charge", that he "was to make sure he [Bradley] was home" because Amberson was "en route to talk to him" and that he never said anything to Bradley and did not tell Bradley why he was being picked up.

Bradley testified that Piedmont Officers Kiser and Murphy actually told him he was "under arrest for suspicion of murder" and told him not to talk. Murphy "pushed him down against the trunk of the car and handcuffed" him, picked up his leg, looked at his foot, and told Kiser, "Yeah, that's the print we got." Bradley testified that he was frisked outside his house before he was placed in the patrol car.

The State's evidence is inexplicitly silent as to what actually occurred when Bradley was picked up.

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[1] Piedmont Police Office Greg Kiser testified at the suppression hearing that he was not present when Bradley was "picked up for questioning at his home." Officer Murphy testified that he was accompanied by Officer Terry Kiser. Terry Kiser never testified.

The State's evidence does not reflect any conversation between Bradley and the police at Bradley's residence. Chief Amberson handcuffed Bradley and placed him in the Sheriff's car. Bradley was taken to City Hall where the handcuffs were removed. Bradley was handcuffed because it was the usual policy of the Piedmont Police Department to handcuff "suspects being transported."

Bradley testified that, after he had been handcuffed and placed in a patrol car, Chief Amberson arrived and went into his apartment for two or three minutes. Amberson denied this.

Bradley was taken to the police station and uncuffed. The State's evidence shows that Bradley was not placed under guard while Bradley testified that he was. Bradley was not fingerprinted or photographed, contrary to the usual practice with felony suspects being arrested.

Bradley voluntarily waived his Miranda rights. Bradley testified that "they just told me if I felt I needed a counselor, you know, that they would stop until I had one. And I told him, 'Well, nothing to hide (sic). I don't see where I should need counsel.'" He was first questioned at approximately 10:00 that morning. At that time, only routine background information was obtained (name, age, date of birth, address, and employment). Around 10:50 a.m., Sergeant Gregory Riser obtained fingernail scrapings from Bradley.

At 11:08 that same morning, Bradley signed a written "permission to search" after Sergeant Danny Bradley had read the form to him and given Bradley the opportunity to read the form himself. Immediately above Bradley's signature on this consent form appears the following paragraph: "I am giving this written

permission to these officers freely and voluntarily, without any threats or promises having been made, and after having been informed by said officer that I have a right to refuse this search and/or seizure." (Emphasis added.) Bradley testified that he signed the consent form because "Officer Murphy told me if I would cooperate that it would speed up the process and they could get through with me and, you know, go to somebody else." Bradley also testified that he was "upset" and "couldn't really answer" whether he consented to the search because of what Officer Murphy told him or because he desired to assist the police and knew that he did not have anything to worry about. Bradley denied being told that he had a right to refuse to sign the consent form.

A statement was taken from Bradley "sometime afternoon and before about four" after his house had been searched. This statement was substantially the same as what Bradley had told Officer Doyle when he had reported Rhonda's disappearance. Additionally, at trial, Bradley's account of the events of January 24th and 25th was substantially identical to the statement he gave the police. At trial, Bradley testified that he told the police the "whole" truth "up to a point" and admitted that he had lied about being home all night and that he had in fact left his house before he discovered that Rhonda was missing.

The State's evidence shows that, on the afternoon of January 25th, Bradley voluntarily agreed to go to the Department of Public Safety in Birmingham where he was given a polygraph test, the results of which are not disclosed in the record. On cross examination, Bradley testified that he went voluntarily to

Birmingham because he "knew [he] didn't have anything to hide and [he was] willing to cooperate." Bradley testified that he cooperated "as best he could." Bradley also testified that he cooperated because he did not have anything to hide and because he had been told that the sooner he cooperated the sooner he could leave.

> "Q [District Attorney]: Isn't it a fact that actually what happened on this occasion, that you cooperated with them because you felt like you didn't have anything to hide; is that not true?
>
> "A [Bradley]: I know I didn't have anything to hide.
>
> "Q. Right. So, you cooperated with them one hundred percent; did you not?
>
> "A. They told me if I cooperated, the sooner I cooperate, the sooner I get to leave."

Bradley was returned to his home at approximately 4:00 on the morning of January 24, 1983, approximately twenty hours after he had been picked up by the police. Chief Amberson testified that Bradley told him that he "didn't have anything to hide and wanted to stay there until he got it cleared up." Bradley was released without being charged or placed under bond.

Medical technologist James Griffith testified that on January 26th, the day Bradley was returned home, Bradley "willingly" gave blood and saliva samples at the Piedmont Medical Clinic "about twelve o'clock" that day. Bradley testified that the police told him that he could either give them the samples or they would get a court order, so he said, "Well, I'll give it to you." At trial, Bradley testified that he gave the blood and saliva samples of his "own free will: They asked and I obliged."

The next day, January 27th, Bradley, while at his home, consented to a second search of his residence and signed a written permission to search. At that time, Mrs. Bradley was present and she gave the police a soiled pair of Rhonda's underwear.

Bradley returned to City Hall three or four times "under police escort." Bradley testified, "When they would come to pick me up, I just, you know, I would go." He was finally arrested after his indictment on March 22, 1983.

At the time Bradley was "picked up" in January of 1983, he was twenty-five years old and married. He had completed the tenth grade and worked as a carpenter and a mechanic. Bradley was no stranger to police and criminal procedure. His criminal history reveals a number of arrests. At the time of Rhonda's murder, Bradley was on probation from a 1982 conviction for burglary in the third degree.

THE ARREST

The State failed to prove that Bradley consented to the police custody or that the arrest was legal.

This case falls within the ambit of Hayes v. Florida, ___ U.S. ___, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985), which clarifies the holdings of Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); and Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). Hayes holds that probable cause is required for the "involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes, whether for interrogation

or fingerprinting. . . ." Hayes, ___ U.S. at ___, 105 S.Ct. at 1647. "The Court held that the line between brief detention and full-fledged arrest is crossed when the police 'forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes.'" United States v. Gonzalez, 763 F.2d 1127, 1132 (10th Cir. 1985), quoting Hayes, ___ U.S. at ___, 105 S.Ct. at 1647. "[R]easonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative." Royer, 460 U.S. at 499, 103 S.Ct. at 1325. However, Hayes does not change the rule that "a voluntary trip to the police station for questioning does not implicate the Fourth Amendment." United States v. Webster, 750 F.2d 307, 321 (5th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985); Cox v. State [Ms. 6 Div. 560, October 8, 1985], ___ So.2d ___ (Ala.Cr.App. 1985).

Both at trial and on this appeal, it is undisputed that the Piedmont Police had no probable cause to arrest Bradley when they picked him up for questioning. Under Hayes, it is clear that Bradley was actually arrested because he was removed from his home, transported to the police station, detained, and interrogated.

The trial court made no specific findings in denying the motion to suppress. However, in its written order sentencing Bradley to death, the trial court found that "Bradley was transported by a department vehicle to the Piedmont police station on January 25, 1983, at approximately 9:30 a.m. for

routine questioning as the last known person to see the victim alive." This clearly qualifies as an arrest under Hayes unless Bradley consented to accompany the police to the station for questioning. United States v. Williams, 604 F.2d 1102, 1124 (8th Cir. 1979) ("[T]he lawfulness of appellant's continued presence in the company of the police after the investigatory stop must be based upon either consent or probable cause, regardless of whether appellant was formally arrested or involuntarily detained for further questioning.").

The State carries the burden of proving that consent was given freely and voluntarily. Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968). "Consent must be proved by clear and positive testimony and must be unequivocal, specific, and intelligently given, uncontaminated by any duress and coercion." United States v. Williams, 754 F.2d 672, 674-75 (6th Cir. 1985). Whether consent is in fact voluntary is "a question of fact to be determined from the totality of the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973); United States v. Recalde, 761 F.2d 1448, 1453 (10th Cir. 1985). Within the totality of the circumstances, there are three specific factors to consider in determining whether the State has sustained its burden of proving that the consent was voluntary.

> "In determining the specifics necessary to sustain the burden of showing that consent was voluntary, this court has established a three-tiered analysis. First, there must be clear and positive testimony that the consent was unequivocal and specific. Second, the Government must establish that the consent was given without duress or coercion. Finally, we evaluate those first two standards with the traditional indulgence of the courts against a

presumption of waiver of constitutional rights. See United States v. Abbott, 546 F.2d 883, 885 (10th Cir. 1977); Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962)." Accolde, 767 F.2d at 1453).

Likewise, in determining whether an individual has been seized or has voluntarily chosen to undergo police custody and interrogation, the totality of the circumstances must be considered.

> "[T]he surrounding circumstances must be considered by the trier of fact in determining whether an individual was 'seized' or voluntarily chose to undergo a confrontation with and station house interrogation by police. Hicks v. United States, supra [127 U.S.App.D.C. 209, 382 F.2d 158 (1967)]. Some relevant factors to be considered are (1) whether police gave the individual the option of accompanying them to the station for investigation. Fuller v. United States, 132 U.S.App.D.C. 264, 407 F.2d 1199 (1968), cert. denied, 393 U.S. 1120, 89 S.Ct. 999, 22 L.Ed.2d 125 (1969); (2) whether the individual was specifically told he was not under arrest. United States v. Brunson, 549 F.2d 348 (5th Cir.), cert. denied, 434 U.S. 842, 98 S.Ct. 140, 54 L.Ed.2d 107 (1977); and (3) whether a reasonable person in the suspect's shoes would have thought he was under arrest. Hicks v. United States, supra." Bridges v. United States, 392 A.2d 1053, 1056 (D.C. 1978), cert. denied, 440 U.S. 938, 99 S.Ct. 1286, 59 L.Ed.2d 498 (1979).

The record does not show whether the police gave Bradley the option of accompanying them to the station for investigation. While there was testimony by Chief Amberson that Bradley was not told that he was under arrest, there is absolutely no testimony whatsoever that Bradley was given any alternative to accompanying the police.

The evidence does show that Bradley was never told that he was not under arrest. Officer Murphy testified that he did not tell Bradley why he was being picked up. Chief Amberson did not testify to anything he said to Bradley. He only stated that he did not tell

Bradley that he was under arrest. Murphy and Anderson were the only officers to testify that were present when Bradley was picked up.

The significance of what the officers actually told Bradley when they picked him up for questioning cannot be underestimated in determining whether or not an arrest actually occurred or whether Bradley consented and voluntarily agreed to accompany the officers.

> "[O]nly exceptionally clear evidence of consent should overcome a presumption that a person requested to accompany an agent to an office no longer would feel free to leave. Such a request combines a substantial intrusion on an individual's freedom, a marked increase in the coercive nature of the environment in which the individual will be responding to police, and substantial psychological coercion from the intimation that there is strong suspicion that an individual is involved in a criminal act. Silently following an officer would rarely constitute sufficient evidence of consent under almost any circumstances." United States v. Berry, 670 F.2d 583, 598 (5th Cir. 1982).

See also State v. Bailey, 417 A.2d 915, 918 (R.I. 1980) (Where police officer apprised defendant that he was wanted in connection with rape investigation and asked defendant to accompany police to station, and police did not attempt to question the defendant before asking him to leave with them, nor did they inform him that he was not under arrest or that he was free to remain at home, the defendant was "arrested" in his apartment when the police asked him to accompany them to the police station.).

Finally, the circumstances of this particular case as contained in the record convince us that a reasonable person in Bradley's shoes would have thought he was under arrest when he was handcuffed and placed

in the sheriff's patrol car. There is no evidence that Bradley was told why he was handcuffed, that he was not under arrest, that he was free to leave, that he could meet the police at the station or that he could come at another time.

Generally and except in the most exceptional circumstances, a person must be considered under arrest once he has been handcuffed. People v. Calhoun, 73 A.D.2d 972, 424 N.Y.S.2d 247 (1980); People v. Galloway, 89 Misc.2d 435, ___, 391 N.Y.S.2d 798, 800 (Sup.Ct. 1977); Commonwealth v. Boscioli, 240 Pa.Super. 135, 137, 361 A.2d 834, 835 (1976). The handcuffing of an individual without explanation amounts to a show of official authority such that "a reasonable person would have believed he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980).

> "We have shoved many an analysis through the eye of a needle, but we cannot cope with the enormity of the incongruity urged by respondent in saying that a person who is handcuffed and asked to accompany an officer, freely consents to do so. Nor can we conceptualize that a person in this position believes that he or she is free to leave the area of detention. The act of handcuffing unequivocally manifests police restraint regardless of the suspect's supposed consent to the procedure." People v. Campbell, 118 Cal.App.3d 583, 596, 173 Cal.Rptr. 442, 446 (Cal.Ct.App. 1981).

In denying Bradley's motion to suppress, the trial court quoted from Justice White's opinion in Florida v. Royer, 460 U.S. at 506-07, 103 S.Ct. at 1329:

> "We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. Even in the discrete category of airport encounters, there will be endless

> variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment."

From the arguments presented to the trial court, its comments and ruling denying the motion to suppress, this Court can only conclude that the trial court found that Bradley consented to the encounter with the police. It is easy to conceive that Bradley would have voluntarily accompanied the police and cooperated with the investigation after having informed them of Rhonda's disappearance. Yet, while this argument is not untenable, given proper proof, it is not supported by the evidence. It is difficult to see how the trial court could determine that Bradley consented to being "picked up for questioning" given the absence of any testimony from the police about what they told or asked Bradley during this confrontation and the nature of his response. Even if we assume that the trial court did not believe Bradley's testimony, the State's evidence does not show that the prosecution carried its burden of proving that Bradley freely and voluntarily consented to accompany the police. The evidence is simply insufficient to support such a finding. Consequently, we must conclude that Bradley's arrest was without his consent and illegal because it was without probable cause.

FIFTH AMENDMENT VOLUNTARINESS

Before determining whether Bradley's consent to search and his statements were tainted by his illegal arrest, we must first determine their voluntariness. "The fact of custody does not itself negate

voluntariness." United States v. Alfonso, 759 F.2d 728, 741 (9th Cir. 1985); Wallace, 654 F.2d at 554 (The per se position that consent cannot validly be given where the defendant is the subject of an illegal arrest and search is improper and is an incorrect legal standard.). Fifth Amendment voluntariness is "merely a 'threshold requirement' for Fourth Amendment analysis." Dunaway v. New York, 442 U.S. 200, 217, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824 (1979). "[T]he 'voluntariness of the statement is a threshold requirement'; this is obviously so, for absent voluntariness the statement can be suppressed without resort to any fruits analysis." W. LaFave and J. Israel, 1 Criminal Procedure 743-44 (1984).

The State shoulders the burden of proving this issue. Ex parte Callahan, 471 So.2d 483, 484 (Ala. 1985). "[I]n attempting to prove voluntary consent following an illegal arrest, the government bears a heavier burden than when consent is given after a legal arrest." United States v. Cherry, 759 F.2d 1196, 1210 (5th Cir. 1985). "The state bears the burden of proving, by clear and positive testimony, that the consent was, in fact, freely and voluntarily given. The testimony must prove there was no duress or coercion, either express or implied, and that the consent was specific, unequivocal, and freely and intelligently given." Coats v. State, 434 So.2d 864, 867 (Ala.Cr.App. 1983).

"[T]he question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances."

Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973); See also Pyles v. State (Ms. 4 Div. 373, October 22, 1985), ___ So.2d ___ (Ala.Cr.App. 1985).

> "To determine whether a defendant's consent was voluntary, a court must look to the totality of all the circumstances. [Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973)]. Also, '[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.' Id. This Court has identified six factors, 'none of which is . . . controlling,' which a court is to take into consideration in determining whether a defendant's consent to a search was voluntary: voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and the defendant's belief that no incriminating evidence will be found. United States v. Phillips, 664 F.2d at 1023-24." United States v. $64,000.00 in U.S. Currency, 722 F.2d 239, 245 (5th Cir. 1984).

Excluding any taint or infection flowing from the apparent illegality of Bradley's arrest, the record supports the trial court's finding that "[a]t the police station the Defendant was fully advised of his legal rights and then indicated his desire to cooperate with the legal authority." Although this finding was made on conflicting evidence, the trial court's "credibility choices at suppression hearings are binding on this court." United States v. Aldridge, 719 F.2d 368, 373 (11th Cir. 1983). "The trial court's finding [of the voluntariness of the consent to search] will not be disturbed on appeal unless the appellate court is convinced that the conclusion is palpably contrary to the weight of the evidence." Cooks v.

State, 434 So.2d 864, 867 (Ala.Cr.App. 1983). We indulge a presumption that the trial court properly ruled on the weight and probative force of the evidence. The trial judge was in a better position to judge thereof than this Court having seen the witnesses, observed their demeanor, and heard them testify. Sullivan v. State, 23 Ala.App. 464, 465, 127 So. 256, 257 (1930). In reviewing the correctness of the trial court's ruling on a motion to suppress, this Court makes all the reasonable inferences and credibility choices supportive of the decision of the trial court. Additionally, if the trial court's ruling is correct for any reason, it will not be reversed because the trial court assigned the wrong reason. Harnage v. State, 290 Ala. 142, 144, 274 So.2d 352, 354 (1972).

Here, Bradley indicated his consent to the search by signing a consent to search form after he had been advised of his constitutional rights under Miranda and after having been informed that he had the right to refuse the request to search. Although not dispositive on the question of voluntariness, "such knowledge was highly relevant to the determination that there had been consent." United States v. Mendenhall, 446 U.S. at 558-59, 100 S.Ct. at 1879, 64 L.Ed.2d 497. See also United States v. Morgan, 725 F.2d 56, 58 (7th Cir. 1984). "[P]roof by the prosecution that the consenting party was warned of his rights or that he was aware of his [Fourth Amendment] rights is often a significant factor leading to a finding that the consent was voluntary." W. LaFave, 2 Search and Seizure § 8.2(i) at 670-71 (1978). "The fact that the Miranda warnings were given is often cited as a circumstance

contributing to the conclusion that the consent to search subsequently given was voluntary, although as with a warning of Fourth Amendment rights it cannot be said that the giving of the warning inevitably compels such a conclusion." 2 Search and Seizure § 8.2(i) at 673. See also United States v. Smith, 543 F.2d 1141, 1146 (5th Cir. 1976), cert. denied, 429 U.S. 1110, 97 S.Ct. 1147, 51 L.Ed.2d 564 (1977); Hollarder v. State, 418 So.2d 970, 972 (Ala.Cr.App. 1982).

We have no difficulty in determining that Bradley's statements were voluntary within the context of the Fifth Amendment. The record shows that he knowingly, intelligently, and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "Where the voluntariness inquiry presents conflicting evidence and the trial judge finds that the confession was voluntarily made, great weight must be given his judgment." Williams v. State, 461 So.2d 834, 838 (Ala.Cr.App. 1983), reversed on other grounds, 461 So.2d 852 (Ala. 1984).

Considering the evidence in the light most favorable to the trial court's determination of voluntariness, this Court finds that the weight of the evidence supports the trial court's determination of voluntariness of the consent to search and the statement.

FOURTH AMENDMENT ATTENUATION

However, it is impossible to consider the voluntariness of Bradley's consent to search and his statement apart from his illegal arrest.

> "In order to be admissible into evidence, a confession must satisfy the requirements of both the Fourth and Fifth Amendments to the Constitution of

the United States. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). A confession must be voluntary, both in the sense that it was not the product of an illegal detention, Dunaway; Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982), and in the sense that it was obtained only after an intelligent, knowing, and voluntary waiver of constitutional rights. Miranda. A confession which is voluntary for purposes of the Fifth Amendment under Miranda does not necessarily satisfy the voluntariness requirement of the Fourth Amendment that the confession was not obtained by exploitation of the illegality of an arrest. Dunaway, 442 U.S. at 217, 99 S.Ct. at 2259, 60 L.Ed.2d at 838-39; Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Fifth Amendment voluntariness is 'merely a "threshold requirement" for Fourth Amendment analysis.' Dunaway, 442 U.S. at 217, 99 S.Ct. at 2259, 60 L.Ed.2d at 839. '[S]tatements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will.' Florida v. Royer, 460 U.S. 491, 501, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229, 238 (1983)." Cox v. State [Ms. 6 Div. 560, October 8, 1985]. ___ So.2d ___ (Ala.Cr.App. 1985).

In order for a statement or a consent to search given after an illegal arrest to be admissible, the State must prove two things: that the statement and consent are voluntary for purposes of the Fifth Amendment, and that they were not the product of the illegal seizure. These two tests are distinct and independent even though they may overlap. 2 Search and Seizure § 9.3(d) at 650.

The attenuation doctrine is an exception to the exclusionary rule. This doctrine does "not hold all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting

establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963). "[E]vidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.' Nardone v. United States, supra, 308 U.S. at 341, 60 S.Ct. at 268." Segura v. United States, ___ U.S.___, 104 S.Ct. 3380, 3386, 82 L.Ed.2d 599 (1984).

Consequently, a confession following an illegal arrest may properly be admitted into evidence where the statement meets the Fifth Amendment standard of voluntariness and is sufficiently an act of free will to purge the primary taint of the Fourth Amendment violation. Brown v. United States, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). This same rule applies to a consent to search. United States v. Robinson, 625 F.2d 1211, 1219 (5th Cir. 1980); 2 Search and Seizure § 8.2; Annot., 9 A.L.R.3d 858 (1966). "[I]n addition to proving voluntariness, the government must show a sufficient break in events to undermine the inference that the consent to search [or statement] was caused by the Fourth Amendment violation." Cherry, 759 F.2d at 1210-11.

In its written findings upon sentencing Bradley to death, the trial court found:

> "The Court further finds that the Defendant, Danny Joe Bradley, was transported by the police department vehicle to the Piedmont police station on January 25, 1983, at approximately 9:30 a.m. for routine questioning as the last known person to see the victim alive. At the police station the Defendant was fully advised of his legal rights and then indicated his desire to cooperate with the legal authority. During the course of that day, the Defendant consented to a search of both the apartment at 309 Barlow Street and his automobile. The Defendant further consented to the taking of his blood and saliva samples from his person as well as fingernail scrapings and a pubic hair sample."

By focusing on Bradley's consent at the station and in apparently not considering whether he had been unlawfully seized, the trial court misapplied the United States Supreme Court decisions governing this issue and subjected itself to the same criticism advanced against the district court in United States v. Beraldo, 761 F.2d 1448 (10th Cir. 1985), that the court did not make its finding in light of the requirement that any consent be free from the taint of the illegal detention.

> "The Supreme Court has consistently held that evidence obtained after an illegal arrest or seizure must be suppressed as the fruit of the illegal detention. See Wong Sun, ___ U.S. at ___, 105 S.Ct. at 1443; Royer, 460 U.S. at 507-508, 103 S.Ct. at 1329-1330; Dunaway, 442 U.S. at 216-19, 99 S.Ct. at 2258-60; Berger, 388 U.S. at 724, 87 S.Ct. at 1394. There is, however, no per se rule prohibiting use of such evidence, and a defendant's consent may, under certain circumstances, remove the taint of an illegal detention. See Dunaway, 442 U.S. at 216-17, 99 S.Ct. at 2258-59; Brown v. Illinois, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975); see also United States v. Trujillo, 590 F.2d 886, 890 (10th Cir. 1979); United States v. Ballard, 573 F.2d 913, 916 (10th Cir. 1978); cf. United States v. Davis, 656 F.2d 1182, 1184 (5th Cir. 1981). Voluntariness is a question of fact to be determined from the totality of the circumstances. Schneckloth, 412 U.S. at 227, 93 S.Ct. at 2047, and we

accept the trial court's finding unless it is clearly erroneous. Cooper, 733 F.2d at 1364. When attempting to establish that there was voluntary consent after an illegal stop, however, the Government has a heavier burden to carry than when the consent is given after a permissible stop. Troutman, 590 F.2d at 606; Ballard, 573 F.2d at 916.

"Moreover, when consent is obtained after an illegal arrest, the Government must establish a break in the causal connection between the illegality and the evidence thereby obtained. Dunaway, 442 U.S. at 217-18, 99 S.Ct. at 2259-60; Brown, 422 U.S. at 602-605, 95 S.Ct. at 2261-2263. An alleged voluntary act must be 'sufficiently an act of free will to purge the primary taint' of the illegal detention. Id. at 602, 95 S.Ct. at 2261 (quoting Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963)).

"The record indicates that the district court found the consent at the station to be voluntary without considering whether Recalde had been unlawfully seized and detained. The court therefore did not make its finding in light of the requirement that such consent be free from the taint of the illegal detention. Because of this, and because the illegal nature of Recalde's seizure and detention are critical, we conclude that the district court's finding of consent is clearly erroneous." Recalde, 761 F.2d at 1457-58.

Despite this apparent misapplication of the governing legal principles by the trial court, we find that the record does provide sufficient information to justify the admission of Bradley's statement and the evidence found at his residence.

Upon examining the totality of the circumstances in this particular case, we are convinced that Bradley's illegal arrest did not taint his voluntary and freely given statements. It is the very totality of all the circumstances which compels this conclusion.

It was Bradley himself who first notified the police of Rhonda's disappearance. Bradley gave an account of his actions both before and after the

child's disappearance to Officer Doyle before her body was discovered. Bradley confirmed this account to the police after he had been "picked up for questioning." At trial, Bradley again affirmed the truth of his statement with the exception of his admission that he had not been at home all night before he discovered Rhonda's absence as he had told the police.

Once at the police station, Bradley fully cooperated "as best he could," stating that he "wanted to stay there until he got it cleared up." After having been returned home, Bradley voluntarily gave blood and saliva samples at a hospital and consented to a second search of his residence. We cannot place much significance on the fact that Bradley returned to the police station three or four times for questioning simply because the record shows only that Bradley was "escorted" by the police on each occasion.

Bradley was in fact acting the part of a "cooperating, aggrieved" father concerned about his stepdaughter's disappearance. Thompson v. McManus, 512 F.2d 769, 771 (8th Cir.), cert. denied, 421 U.S. 1014, 95 S.Ct. 2421, 44 L.Ed.2d 683 (1975). His consent to search and his statement were obviously given "with the hope that his cooperation would result in his elimination as a suspect in the case" and Chief Amberson testified that Bradley told him that he wanted to get it "cleared up". Commonwealth v. Harris, 387 Mass. 758, 766, 443 N.E.2d 1287, 1293 (1982). A significant, but not controlling, factor to consider in examining the totality of the circumstances to determine voluntariness is whether or not the accused initiated the original contact with the police. State v. Douglas, 123 Wis.2d 13, 14-15, 365 N.W.2d 580, 582-

83 (1985) (The accused implied consent to a search of his home after he telephoned the police and reported his location and that he had killed everyone.). See also State v. Fredette, 411 A.2d 65, 70 (Me. 1979) (Accused's consent to search was not the product of police coercion where the accused initiated the presence of the police through her urgent telephone calls and continually cooperated with them.); Lewis v. State, 285 Md. 705, 718-19, 404 A.2d 1073, 1080 (1979) (One of factors in finding consent to search was fact that accused summoned police after returning to house where slain bodies of wife and daughter were located.); Kelly v. State, 75 Wis.2d 303, 313, 249 N.W.2d 800, 805 (1977) (Where the accused had the police called and implied that the victim had either shot himself or had been shot by a third person, "there was an implied consent not only to aid the victim but to determine what had caused the death or injury and who was responsible.").

Bradley had a reason to impress upon the police the fact that he was cooperating with their investigation. "[I]nformation tending to show why the person, at the time of the consent, believed it advantageous to cooperate with the police is also highly relevant." 2 Search and Seizure § 8.2(9) at 660.

> "Even when the person allegedly consenting is later a defendant in the criminal prosecution, there may still be available evidence why he had reason to give consent and thus impress upon the police the fact that he was cooperating with their investigation. . . . Another [such situation] is that in which it appears the defendant decided to adopt a cooperative posture in the mistaken belief that he could thereby divert or prevent police suspicion of him." 2 Search and Seizure § 8.2(9) at 661.

Having informed the police of Rhonda's disappearance, having told them that he and Rhonda had had an argument earlier that particular evening, and having led the police to believe that he was the last known person to have seen Rhonda before she disappeared, Bradley had placed himself in such a posture that he could hardly afford to do anything but fully cooperate with the police without centering suspicion on himself. Apart from this practical and common sense approach to the voluntariness questions there are sufficient and adequate "legal" grounds for finding that Bradley's consent and statements were not products of the illegal arrest.

Here, this Court finds that Bradley's statement to the police was not obtained by exploitation of the illegal arrest because before his arrest Bradley had voluntarily appeared at the police station and given the police the substance of the statement he made after his arrest. In People v. Emanuel, 98 Mich.App. 163, 295 N.W.2d 875 (1980), cert. denied, 459 U.S. 1220, 103 S.Ct. 1226, 75 L.Ed.2d 461 (1983), the Court held that the defendant's confession was not obtained by exploitation of his illegal arrest because before his arrest the defendant had indicated an intention to turn himself in and to speak to the police about the crime and had actually made a statement which contained the essence of his subsequent post-arrest confession.

After concluding that the defendant's arrest was illegal because it was made without probable cause, the Michigan Court concluded:

> "However, this alone does not per se require the suppression of the statement made by defendant to the police on July 25. Under Fourth Amendment rubric, the confession must be excluded from evidence only if it was obtained by

exploitation of the illegal arrest, i.e., if it was the product of the illegal arrest. Brown v. Illinois, supra, 422 U.S. 603, 95 S.Ct. 2261, Dunaway v. New York, supra, 442 U.S. 216-218, 99 S.Ct. 2258-2259. The focus is on the causal nexus between the illegality and the confession, or, to put it another way, the question is whether the connection was sufficiently attenuated to permit the use at trial of the evidence obtained during the period of illegal detention: whether the statement was purged of its primary taint. Brown, supra, 422 U.S. 602-604, 95 S.Ct. 2261-2262. Dunaway, supra, 442 U.S. 217-218, 99 S.Ct. 2258-2259, and the cases cited therein.

"Brown sets out a number of factors which are relevant in determining the admissibility of a confession obtained while a defendant is illegally detained:

> "'The question whether a confession is the product of a free will under Wong Sun [v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)] must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution.' (Footnotes and citations omitted.) Brown, supra, 442 U.S. 603-604, 95 S.Ct. 2261.

"While not expressly enumerated as a factor worthy of consideration, we find that any antecedent circumstances, i.e., events transpiring prior to the 'arrest', may well be relevant to the question of whether the statement should be excluded. We do not perceive an intention by the Court to make the factors listed in Brown exclusive and/or exhaustive.

"The voluntariness of the confession in a Fifth Amendment sense is not directly challenged. However, as Brown points out, the Fourth Amendment question is whether the statement is 'sufficiently' an act of free will so as to purge the primary taint of the unlawful arrest. Brown, supra, 599, 95 S.Ct. 2259. Phrased another way, we must determine if the confession was obtained by means sufficiently distinguishable to be purged of the primary taint. That is why the giving of the Miranda warnings, although a factor operating in favor of admissibility under Brown, is not alone dispositive of the causal nexus question.

"Militating against admissibility was the temporal proximity between the arrest and the confession as well as the fact that there was no intervening event of significance whatsoever. So too, as in Brown, the arrest of defendant without probable cause therefor had a 'quality of purposefulness' about it, although it was much less of a 'fishing expedition' for evidence than the police actions were in that case, and surely less flagrant misconduct. Dunaway adds little to this analysis, as the Court therein characterized that case as 'virtually a replica of the situation in Brown'. Dunaway, supra, 442 U.S. 218, 99 S.Ct. 2259.

"What we find to be the factor which distinguishes the case at bar from Brown and Dunaway is the conversation involving defendant that took place prior to his arrest and confession, which, in our opinion, operated to sufficiently attenuate any causal connection between the arrest and the giving of the inculpatory statement by defendant so as to justify the admission of the confession in evidence at trial. The necessary nexus was not present because, as we see it, the quintessential variable which compelled or motivated defendant to make a confession was his earlier discussion with his cousin and Lieutenant Stewart, at which time he made a statement which contained the essence of his later July 25 confession, plainly was made of defendant's own volition, without the inherent coercion of a custodial environment or any other compunction, and was told to a police officer defendant had never previously met. Also supportive of his conclusion is defendant's statement to the Taylor Police at the time he was first approached by them, to the effect that he had intended to come speak with them

but had not yet done so. More importantly, defendant, immediately following his conversation with Lieutenant Stewart, had expressed an intention to turn himself in to the Taylor police while accompanied by counsel.

"We find these circumstances to be sufficient to satisfy the prosecution's burden of showing that the custodial statement given by defendant to the Taylor police on July 25 was sufficiently an act of free will to justify admission, i.e., that the confession was not obtained by exploitation of the illegal arrest under the standard announced in Brown and explicated in Dunaway." Emanuel, 98 Mich. App. at 176-79, 295 N.W.2d at 881-82.

Bradley's statement was taken at least two and one-half hours after he had been picked up, after he had been twice warned of his Miranda rights, and after he had signed a consent to search his residence. We do not view the police misconduct as especially flagrant. Although Bradley was considered a suspect, he was also the only witness available to the police. Bradley had initiated the confrontation with the police by reporting Rhonda's absence and the circumstances surrounding her disappearance.

We also find that Bradley's consent to search was not the product of his illegal arrest. "[C]onsent can, in proper circumstances, validate a search following an illegal arrest." United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978). See also United States v. Troutman, 590 F.2d 604, 604 (5th Cir. 1979); United States v. Pike, 449 F.2d 191, 193 (5th Cir. 1971); Bretti v. Wainwright, 439 F.2d 1042, 1046 (5th Cir.), cert. denied, 404 U.S. 943, 92 S.Ct. 293, 30 L.Ed.2d 257 (1971). The giving of the Miranda warnings and the signing of a consent to search form can satisfy the requirement of intervening circumstances. Reynolds, 761 F.2d at 1458; 2 Search and Seizure at 283, n. 93 (1985

Pocket Part). "[P]roof by the prosecution that the consenting party was warned of his rights, or that he was aware of his rights is often a significant factor leading to a finding that the consent was voluntary." 2 Search and Seizure at 670-71.

In light of the cooperation actually displayed by Bradley at the police station and after his release, and considering, again, the fact that it was Bradley himself who actually initiated the investigation by reporting Rhonda's disappearance and soliciting the help of the Piedmont Police in finding her, we find that his consent to search, as well as his statements, were not tainted by the illegal arrest.

III

Bradley argues that the comments by the District Attorney in his closing argument to the jury constituted an improper comment on his post-arrest silence in violation of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Doyle held that a prosecutor violates due process if he uses the defendant's post-arrest silence for impeachment purposes. This ruling was limited by Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), which held that the prosecutor may impeach a defendant with his post-arrest silence without violating due process when the defendant's post-arrest silence precedes Miranda warnings.

Bradley was arrested following his indictment on March 22, 1983, and held without bond in the county jail until his trial on July 11, 1984. By a letter to his wife dated July 4, 1983, Bradley admitted that he had left the house the night of Rhonda's disappearance. This was contrary to what Bradley had earlier told the

police when he had been questioned in December of 1981. The District Attorney cross examined Bradley about why he never told the police the whole truth, both before and after his arrest and argued the subject before the jury in closing argument.

As the Attorney General properly notes, here there was no evidence that Bradley was ever given Miranda warnings at either the time of his arrest upon the indictment or any time thereafter. Consequently, this case falls outside the coverage of Doyle. See Fletcher.

Additionally, "Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements." Anderson v. Charles, 447 U.S. 404, 408, 100 S.Ct. 2180, 2182, 65 L.Ed.2d 222 (1980). Here, as in Anderson, the prosecutor's questions and comments ask why, if Bradley's trial testimony were true, he didn't tell the police that he was not home all night instead of telling them that he was. "Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." Anderson, 447 U.S. at 408, 100 S.Ct. at 2182, 65 L.Ed.2d 222.

Here, Bradley made two inconsistent statements - the first to the police in reporting Rhonda's disappearance and pursuant to questioning after having voluntarily waived his Miranda rights, and the second in a letter written to his wife after his indictment. Doyle does not apply to the facts of this case. "Each of two inconsistent descriptions of events may be said to

involve 'silence' insofar as it omits facts included in the other version. But Doyle does not require any such formalistic understanding of 'silence,' and we find no reason to adopt such a view in this case." Anderson, 447 U.S. at 409, 100 S.Ct. at 2182, 65 L.Ed.2d 222.

IV

The trial court properly denied Bradley's motion for a new trial on the ground that the State failed to disclose that Ricky McBrayer had told Glenn Burns that he killed Rhonda Hardin.

Before Bradley's trial, Piedmont Police Sergeant Brown told defense counsel that McBrayer had confessed to Rhonda's murder and informed counsel that McBrayer's confession had been investigated and found to be "without grounds. It wasn't true." However, Brown did not tell counsel that McBrayer had made the statement to Glenn "Coffee" Burns.

Glenn E. Burns testified that McBrayer told him that he had accidentally killed Rhonda. Burns told Chief Amberson about three days after the murder. Amberson instructed Sergeant Brown and an ABI agent to "dig into it, which they did and were satisfied with the fact that he didn't have anything to do with it." Amberson testified they discovered McBrayer's confession was not true because they "found out where Mr. McBrayer was that night."

Several days before the hearing on the motion for new trial, Mr. Burns told Chief of Police Ricky Doyle about this matter because Burns had heard that McBrayer was "going to get" him "for going around saying he killed the girl."

Here, the exculpatory evidence - McBrayer's confession - was disclosed to defense counsel. Under

Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See also Ex parte Duncan, 456 So.2d 362, 363 (Ala. 1984). This rule applies regardless of the trustworthiness or admissibility of the evidence. Ex parte Kimberly, 463 So.2d 1109, 1112 (Ala. 1984). Such evidence includes third-party confessions to the crime with which the defendant is charged. Sellers v. Estelle, 651 F.2d 1074, 1076 (5th Cir. 1981), cert. denied, 455 U.S. 927, 102 S.Ct. 1292, 71 L.Ed.2d 472 (1982); Fulford v. Maggio, 692 F.2d 354, 358 (5th Cir. 1982), reversed on other grounds, 426 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983).

We do not think that the State's duty to disclose McBrayer's confession included the duty to disclose the person to whom that confession was made.

The rule of Brady or that of United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), requiring the disclosure of certain exculpatory evidence, even absent a request, was not violated because the State did not inform Bradley of the man to whom McBrayer confessed. We flatly reject Bradley's argument that the failure to disclose the name of Glenn Burns "created a 'red herring' which prevented the defense from pursuing an avenue of investigation which might have turned up evidence tending to exculpate the Appellant." Appellant's Brief, p. 25.

V

The trial court did not cast doubt on Bradley's credibility by questioning him before the jury.

On direct examination, Bradley admitted that, during the night before he discovered Rhonda's absence, he left the apartment to steal a car. Because his automobile was low on gasoline, he stole or borrowed a bicycle from a house in the neighborhood and rode to the place where the car he was going to steal was located. After Bradley had been examined by defense counsel and the District Attorney, the trial court asked him a number of questions, including why he did not actually steal the car and why he did not use the bicycle instead of walking to the hospital to notify his wife of Rhonda's absence before he contacted the police.

In denying defense counsel's requested mistrial, the trial court stated:

> "THE COURT: All right. I've heard the motion. I've heard the arguments made by both sides.
>
> "It's the feeling of the Court when it asked the questions, that it was within its discretionary power to question a witness. I asked some questions in my mind about his testimony. The questions were not meant to and I do not feel imparted to the Jury or to anyone else that I feel one way or the other about the facts. And the Jury, in fact, will be instructed that I don't. I felt it was a reasonable area of inquiry."

We agree with the trial court's assessment of the situation. The court's questions do not fall within that category of objectionable remarks which constitute a comment on the credibility of the accused nor do we find any implication that they were calculated to reduce Bradley's credibility. Cf. James v. State, 337 So.2d 1332, 1341 (Ala.Cr.App. 1976). "In the interest

of justice, a trial judge is given the authority to pose questions to a witness for the purpose of clarifying the issues for the jury's consideration." Richardson v. State, 403 So.2d 297 (Ala. 1981); Hardy v. State, 455 So.2d 265, 268 (Ala.Cr.App. 1984). The court's questions were directed to bringing out the facts of the case and were not error. United States v. Uptain, 531 F.2d 1281, 1291 (5th Cir. 1976).

> "The unquestioned province of the court - in fact, the solemn and sacred duty of a trial judge - is the development and establishment of the truth, and in this connection it is always permissible for the court, and if it appears necessary for him to do so it is his duty, to propound to witnesses such questions as it is deemed necessary to elicit any relevant and material evidence, without regard to its effect, whether beneficial to the one party or the other. Beal v. State, 138 Ala. 94, 35 South. 58. In fact, it is a sacred duty of a judge, both in civil and criminal cases, to give strict attention to the evidence, and to all facts and incidents attendant upon the trial, to propound questions to witnesses if in his judgment he deems it necessary, and to supervise and control the proceedings before him, with a view that justice may not miscarry." Brandes v. State, 17 Ala.App. 390, 391, 85 So. 824, 825 (1920).

By affording Bradley the opportunity to fully explain his reasons and his actions on the night of Rhonda's disappearance, the trial court allowed him to bolster and shore up his testimony giving previously unrelated facts and details which lent Bradley's account some semblance of truth, if in fact, any were to be found in his account to begin with.

We find no impropriety in the court's questions.

VI

Our review of the record convinces this Court that the evidence, although totally circumstantial, was sufficient to prove that Rhonda Nardin was murdered during the commission of a rape and sodomy.

The word "during" as used in the definition of capital offenses "means in the course of or in connection with the commission of, or in immediate flight from the commission of the underlying felony or attempt thereof." Alabama Code 1975, § 13A-5-39.

Rhonda was twelve years old when she was strangled to death. Human semen was found in her mouth, stomach, vagina and rectum. From the expert testimony presented, the jury could have properly inferred that Rhonda engaged in sexual intercourse and deviate sexual intercourse shortly before her death. Fibers from the pants Rhonda was found wearing matched other fibers found in the trunk of Bradley's automobile. There was evidence that Rhonda usually tied her shoes in a double knot. The shoes on Rhonda's body were tied in a single knot, suggesting that someone had dressed her and that she was dead before she was dressed. Fecal, semen, and vaginal fluid stains indicated that the intercourse occurred in a bedroom in Bradley's house.

Bubba Hardin last saw his sister alive sometime after 9:00 on the night of January 24, 1983. Mr. Manus, Bradley's neighbor, was with Bradley from 12:50 to 5:30 on the morning of January 25. From this, the jury could have concluded that Rhonda must have been sexually assaulted, murdered, and disposed of between 9:00 P.M. on the 24th of January and 12:50 that following morning. Considering the ages and relationships of the parties, the nature of the offense, and the time frame within which the crime and disposal of the body must have occurred, the circumstantial evidence supports the reasonable conclusion that Rhonda was murdered during, or in the course of, or in connection with, the commission of a

rape and sodomy. Taylor v. State, 442 So.2d 128 (Ala.Cr.App. 1983); Potts v. State, 426 So.2d 886 (Ala.Cr.App. 1982), affirmed, 426 So.2d 896 (Ala. 1983). Cf. Beverly v. State, 439 So.2d 758 (Ala.Cr.App. 1983).

Although an autopsy revealed no "evidence of trauma in genitalia area," the evidence was also sufficient to show that the element of forcible compulsion was present in both the rape, § 13A-6-61, and the sodomy, § 13A-6-63. Rhonda had been strangled. She was four feet ten and three-eighths inches tall and weighed seventy-seven pounds. She had seven wounds or bruises on her neck. Again, the totality of all the circumstances provides ample evidence to support a finding of forcible compulsion as defined by law: "Physical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person." Alabama Code 1975, § 13A-6-60(8). Under the principles of Dolvin v. State, 391 So.2d 133 (Ala. 1980), and Cumbo v. State, 368 So.2d 871 (Ala.Cr.App. 1978), cert. denied, 368 So.2d 877 (Ala. 1979), there was evidence from which the jury might reasonably conclude that the evidence and all reasonable inferences therefrom excluded every reasonable hypothesis other than guilt and proof of the corpus delicti of the charged offenses.

VII

In sentencing Bradley to death, the trial court did not err in finding as an aggravating circumstance the fact that the capital offense was committed while Bradley was engaged in the commission of a rape, which

is an aggravating circumstance described in § 13A-5-49(4), even though rape was an element of the capital offense charged in the indictment. § 13A-5-40(a)(3). "The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence." § 13A-5-50. Ex parte Kennedy, 472 So.2d 1106, 1108 (Ala. 1985); Colley v. State, 436 So.2d 11, 12 (Ala.Cr.App. 1983); Dobard v. State, 435 So.2d 1338, 1344 (Ala.Cr.App. 1982), affirmed, 435 So.2d 1351 (Ala. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); Heath v. State, 455 So.2d 898, 900 (Ala.Cr.App. 1983), affirmed, 455 So.2d 905 (Ala. 1984), cert. granted in part, ___ U.S. ___, 105 S.Ct. 1390, 84 L.Ed.2d 780 (1985); Jackson v. State, 459 So.2d 963, 966 (Ala.Cr.App.), affirmed, 459 So.2d 969 (Ala. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985); Julius v. State, 455 So.2d 975, 981-82 (Ala.Cr.App. 1983), affirmed, 455 So.2d 984, 987 (Ala. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 817, 83 L.Ed.2d 809 (1985); Ex parte Kyzer, 399 So.2d 330, 337-38 (Ala. 1981).

VIII

The trial court properly found that "[t]he capital offense was especially heinous, atrocious, or cruel compared to other capital offenses." § 13A-5-49(8). This aggravating circumstance "was intended to apply to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." Ex parte Kyzer, 399 So.2d 330, 334 (Ala. 1981). In Hill v.

State, 422 So.2d 816 (Fla. 1982), cert. denied, 460 U.S. 1017, 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983), the twenty-two-year-old defendant strangled a twelve-year-old girl after raping her. After the murder, the defendant showed the body to a friend and boasted, "She wouldn't give it up, so I had to take it." 422 So.2d at 817. The Florida Supreme Court held: "The record shows that appellant committed the rape and murder in such a fashion to make it especially heinous, atrocious, and cruel." Id. at 819.

The State of Georgia has a similar aggravating circumstance which provides, "The offense of murder . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim." Ga. Code Ann. § 27-2534.1(b)(7). In Phillips v. State, 250 Ga. 336, 340, 297 S.E.2d 217, 221 (1982), the Georgia Supreme Court held, "[t]orture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death." In the earlier case of Hance v. State, 245 Ga. 856, 861, 268 S.E.2d 339, 345, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 611 (1980), that same Court held, "[t]orture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, ___ U.S. p.___, 100 S.Ct. p. 1766. Serious sexual abuse may be found to constitute serious physical abuse. House v. State, 232 Ga. 140, 145-147, 205 S.E.2d 217, 221-222 (1974), cert. denied, 428 U.S. 910, 96 S.Ct. 3221, 49 L.Ed.2d 1217 (1976)." In House, the Georgia Supreme Court found that the death penalty was not excessive or disproportionate on the conviction of a defendant on two counts of

having murdered children after committing acts of sodomy upon them.

This Court has no difficulty in independently determining that this capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. In Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court of the United States held that the sentence of death for the crime of the rape of an adult woman was grossly disproportionate and constituted excessive punishment forbidden by the Eighth Amendment as cruel and unusual punishment. In so doing, the court commented on the seriousness of the crime:

> "We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the 'ultimate violation of self.' It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well." 433 U.S. at 597-98, 97 S.Ct. at 2869, 53 L.Ed.2d 982.

Here, Rhonda was not only raped but she was sexually abused and strangled to death. Rhonda was not an adult but a twelve-year-old child. Her assailant was her twenty-two-year-old stepfather. The especially heinous, atrocious, or cruel aggravating circumstance was warranted and fully justified in this case.

IX

This section deals with the extent of the appellate review required in a case where the death penalty has been imposed.

This Court has searched the entire record on appeal and has found no plain error or defect which has or probably has adversely affected any substantial right of Bradley. A.R.A.P. Rule 45A.

There is no evidence in the record to indicate that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. Alabama Code 1975, § 13A-5-53(b)(1).

An independent weighing of the aggravating and mitigating circumstances convinces this Court that death is the proper sentence. § 13A-5-53(b)(2).

Considering both the crime and the defendant, the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Dunkins v. State, 437 So.2d 1349 (Ala.Cr.App.), affirmed, 437 So.2d 1356 (Ala. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984) (rape-intentional killing/death); Potts v. State, 426 So.2d 886 (Ala.Cr.App. 1982), affirmed, 426 So.2d 896 (Ala. 1983) (carnal knowledge-intentional killing/life without parole); See also Bell v. State, 461 So.2d 855 (Ala.Cr.App. 1984) (sexual abuse-murder/life without parole); Johnston v. State, 455 So.2d 152 (Ala.Cr.App. 1984) (sexual abuse-murder/life without parole).

The trial court found the existence of two aggravating circumstances: The capital offense (1) was committed while the defendant was engaged in the commission of, or flight, after committing or attempting to commit, rape, specifically rape in the

first degree, § 13A-5-49(4), and (2) was especially heinous, atrocious, or cruel compared to other capital offenses, § 13A-5-49(8). The trial court did not find the existence of any statutory mitigating circumstance. § 13A-5-51. The trial court did note that it had "considered the evidence and testimony presented to the jury and to the Court in regard to the Defendant's background and character as the same pertains to the mitigating circumstances that should be properly considered by the Court." An independent review convinces this Court that the trial court's findings concerning the aggravating and mitigating circumstances are supported by the evidence.

Review convinces this Court that Danny Joe Bradley received a fair trial and that his conviction of a capital offense and sentence to death are proper and due to be affirmed.

AFFIRMED.

All Judges Concur.

(Order) New Trial Denied

STATE OF ALABAMA,	•	IN THE CIRCUIT COURT OF
PLAINTIFF,	•	CALHOUN COUNTY, ALABAMA
VS.	•	
DANNY JOE BRADLEY,	•	CASE NUMBER: CC-83-287
DEFENDANT.	•	
	•	

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ORDER 1/26/84

This matter came on for hearing on motion of the Defendant for a new trial, as amended. Evidence and testimony was offered on October 27, 1983. The State, by District Attorney Robert M. Field, requested the opportunity to present further testimony at a later date. This cause was then re-set for December 9, 1983, but was continued and carried over until December 30, 1983. Hearing was conducted on January 3, 1984. The Defendant was present with appointed counsel on October 27, 1983, and January 3, 1984, when testimony was presented.

The Court has fully and completely considered the testimony and evidence offered, the arguments of counsel for Defendant and the State, and therefrom, the Court is of the opinion that Defendant's motion is due to be denied.

It is therefore Ordered and Decreed that Defendant's motion for new trial be, and is, DENIED.

Done and Ordered this the 26th day of January, 1984.

FILED IN OFFICE 1-26- 1984
R. F. (BOBBIE) COCHRAN, CLERK
CIRCUIT COURT—CALHOUN COUNTY.
By: (Initials)

Malcolm B. Street, Jr.
Circuit Judge

PAGE: C 90

CRIMINAL DIVISION MINUTES, CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

R. F (Forrest) DOBBINS, Clerk

Minutes

Minute Book 29 Page 611

JUDGMENT AND SENTENCE (DEATH). AUTOMATIC APPEAL.

State of Alabama
CC-83-287 vs.
Danny Joe Bradley
(Defendant)

Indictment: (4 Counts) Murder (13A-5-40(a)(1))
Convicted (by Jury) Counts I and 3
Judgment and Death Sentence. Automatic Appeal.
This the 5th day of August, 1983.

The Defendant is present in open Court with Counsel, Ralph Brooks and Thomas E. Dick, and the State is represented by Robert M. Field, District Attorney, and on the 14th day of July, 1983 the Defendant was convicted (by Jury) as charged in Counts I & 3 of Indictment, and, on said date by separate Hearing and Verdict said jury by vote of 12 in favor and -0- against recommended punishment by death, and sentencing was deferred and pre-sentence Report ordered.

Now on this the 5th day of August, 1983 the Court finds that copy of pre-sentence Report made by State Parole-Probation Officer, George Eugene Wood, was furnished to both defense and prosecuting Attorneys.

Upon receiving the "verdict of guilty" of the Jury in this case on July 14, 1983 the Court in accordance with said verdict considered and adjudged the Defendant guilty as charged in Counts I and 3 of the Indictment, and now on this 5 day of August in accordance with said verdict the Court so considers and adjudges said Defendant guilty as charged in said Counts.

The Court proceeds upon pre-sentencing Hearing in open Court without the intervention of a Jury, and, under separate written Decree the Court sets out the Court's finding of fact from the punishment phase and said said sentencing Hearing, and said written findings and Order to be filed of record in this case.

The Defendant is now present in open Court attended by Counsel, and Court fixes punishment at "Death." The Defendant being asked if he had anything to say why the sentence of the law should not now be pronounced upon him answers "No, Sir".

Before passing sentence the Court proceeds to ascertain by examination of the Defendant and other evidence that he is by trade or occupation, a "Mechanic", and he is of the white race, male sex, is twenty-three (23) years of age (date of birth: September 7, 1959) and his physical condition is "good".

After consideration, it is the judgment of the Court that the Defendant, Danny Joe Bradley, suffer death by electrocution, and it is ordered and adjudged that the Defendant be and is hereby sentenced to death by electrocution, and the Court sets date of execution on Nov. 4, 1983.

The Sheriff of this County, shall safely transfer Defendant to the custody of the State of Alabama, and the State's designated Executioner shall at the proper place for the execution of one sentenced to death by electrocution, cause current of electricity of sufficient intensity to cause death, and the application and continuance of such current to pass through the body of Danny Joe Bradley until said Defendant is dead.

The Court notes that this sentence is an automatic appeal.

Under separate written Order the Sheriff shall forthwith safely transport Danny Joe Bradley to the W.C. Holman Prison Unit at Atmore, Alabama, and there deliver said Defendant to the Warden of said prison unit pursuant to Law.

The Court appointed trial Attorneys for Defendant shall continue as Appellat Counsel.

The Court will enter a separate Order granting forma Pauperis Appeal Record.

(Judge Malcolm B. Street Jr.)

(over)

IN RE: (Partial Order) DISCOVERY MOTIONS... PRODN... INSPECTION...

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
VS.	)	CALHOUN COUNTY, ALABAMA
DANNY JOE BRADLEY,	)	CASE NO. CC 83-287
Defendant.	)	

COPY

DISCOVERY ORDER 4/27/83

Pursuant to a hearing Ordered by this Court on the 8th day of April, 1983, and with District Attorney Robert M. Field present for the State of Alabama, and Attorneys Ralph L. Brooks and Thomas E. Dick present for the Defendant, the Court addressed the Defendant's six motions for production and inspection.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That without objection by the State, the following items be produced for inspection together with all tests performed and all test results obtained therefrom:
   - A. All clothes taken from Defendant or any other persons in this investigation;
   - B. Mattress pad taken from Defendant's home;
   - C. Blood samples taken from Defendant or other persons in this investigation;
   - D. Hair samples taken from Defendant or other persons in this investigation;
   - E. Automobile seized from Defendant and all objects or materials found therein.
2. That with regard to the comprehensive motion for the

P.C-17 over

P.2. Discovery Mtn Order

State's investigative files, without objection by the State, the following shall be produced by the State:

A. Blood, saliva, and hair samples, tests, and test results tending to link any person other than Defendant to the victim;

B. All tests performed on the body or clothing of the victim tending to link any person other than Defendant to victim;

C. (See further this Order.)

D. All statements, notes, or memoranda of conversations with individuals named in the discovery motion;

E. (See further this Order.)

F. (See further this Order.)

G. All notes/statements of conversations concerning death of victim by Ricky McBryer;

H. All evidence tending to indicate sexual activity of victim with others than Defendant;

I. All fingerprints and footprints indicating presence of others at discovery location of victim's body;

J. (See further this Order.)

K. (See further this Order.)

That all items of tangible evidence submitted for testing and/or analysis shall remain in the custody of and under the supervision of the Director of the appropriate State Forensic Laboratory or his designated assistant.

Copy

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P.3 Discovery mtn. order.

3. That with regard to requested items C, E, F, J, and K, the State shall furnish to the Court its full and complete investigative file by April 27, 1983, at 4:00 p.m. The Court shall then review State's file for the purpose of determining the presence of any evidence in anyway exculpatory to the Defendant. The Court shall then rule by May 4, 1983, at 4:00 p.m.

DONE and ORDERED this the 27th day of April, 1983.

Malcolm B. Street, Jr.
Circuit Court Judge

Filed 4.27.83
F. Dobbins, Clerk
cc: 1) District Attorney
~~2) Public Defender, Atty~~
2) Leigh Brooks, Atty
3) Thomas E. Dick, Atty.
by F.D.

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P.C. 19

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

NO. 86-6013

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PETITIONER

RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION
TO CERTIORARI

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
ASSISTANT ALABAMA ATTORNEY GENERAL

MARTHA GAIL INGRAM
ASSISTANT ALABAMA ATTORNEY GENERAL

Alabama State House
11 South Union Street
Montgomery, AL 36130
(205) 261-7300

NO. 86-6015

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DANNY JOE BRADLEY,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
ASSISTANT ALABAMA ATTORNEY GENERAL

MARTHA GAIL INGRAM
ASSISTANT ALABAMA ATTORNEY GENERAL

Alabama State House
11 South Union Street
Montgomery, AL 36130
(205) 261-7300

QUESTIONS PRESENTED FOR REVIEW

1(a). Should certiorari be granted to review tne lower court's application of Brady v. Maryland, 373 U.S. 83 (1963), to the specific circumstances of this one fact-bound case?

1(b). Should this Court's limited certiorari powers be granted to review a state court's factual determination as to whether or not a pre-trial discovery order was complied with by the Prosecutor?

2(a). Should certiorari be granted to review the lower court's application of Doyle v. Ohio, 426 U.S. 610 (1976), to the specific circumstances of this one fact-bound case?

2(b). Should certiorari be granted to review the lower court's application of Anderson v. Charles, 447 U.S. 404 (1980), to the specific circumstances of this one fact-bound case?

2(c). Should this Court's limited certiorari powers be granted to review a state court's factual determination as to whether a Prosecutor properly questioned a defendant as to a prior inconsistent statement?

3(a). Should certiorari be granted to review the lower court's application of Taylor v. Alabama, 457 U.S. 687, 690 (1982), to the specific circumstances of this one fact-bound case?

3(b). Should certiorari be granted to review a state court's factual determination as to the voluntariness of a consent to search given by a defendant?

4(a). Should certiorari be granted to review the lower court's application of United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976), to the specific circumstances of this one fact-bound case?

4(b). Should certiorari be granted to review a state court's factual determination as to whether a trial court abused its discretion in asking questions of the defendant?

5. Should this Court's limited certiorari powers be used to review issues which only involve factual determinations by the state court when these issues will be reviewed in a 28 U.S.C. § 2254 proceeding?

6(a). Should this Court grant certiorari as to the issue of whether an overlap between the aggravated aspect of the capital offense and an aggravating circumstance for purpose of sentence determination violates the Eighth Amendment where the issue is clearly without merit?

6(b). Should this Court grant certiorari as to the issue of whether the facts supported the finding that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses where the issue is clearly without merit?

6(c). Should this Court grant certiorari as to the issue of whether the facts supported the finding that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses where the issue involves a relitigation of questions of fact already decided below?

PARTIES

The caption contains the names of all parties in the Court below.

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OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and death sentence is published as Bradley v. State, 494 So.2d 750 (Ala. Crim. App. 1985).

2. The opinion of the Alabama Supreme Court affirming the Court of Criminal Appeals decision is published as Ex Parte Bradley, 494 So.2d 697 (Ala. 1986).

JURISDICTION

The decision of the Alabama Supreme Court affirming Petitioner's conviction and sentence was issued July 25, 1986, and rehearing was denied on September 12, 1986.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner addresses issues involving the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1975, § 13A-5-49(4)

Code of Alabama 1975, § 13A-5-40(a)(1)-(4)

Code of Alabama 1975, § 13A-5-50

Code of Alabama 1975, § 13A-5-46(e)(3)

Code of Alabama 1975, § 13A-5-49(8)

STATEMENT OF THE CASE

The facts and circumstances of the commission of the crime, as found by the Alabama Court of Criminal Appeals are:

On the morning of January 25, 1983, the body of twelve-year-old Rhonda Hardin was found in a wooded area in Piedmont, Calhoun County, Alabama. It was determined that she was the victim of a homicide and that the death was asphyxia due to strangulation by the application of external pressure to the neck. Her body bore some evidence of sexual assault and the autopsy indicated the presence of human semen in her vagina, rectum, mouth and gastric content.

(494 So.2d at 754)

- - - -

The trial court proceedings were stated as follows by the Alabama Court of Criminal Appeals:

Danny Joe Bradley was indicted for the capital murder of Rhonda Hardin, his twelve-year-old step-daughter. A jury convicted him of two counts of a four-count indictment: murder during a rape in the first degree and murder during a sodomy in the first degree in violation of Alabama Code 1975, § 13A-5-40(a)(3). After a sentence hearing, the jury unaminously recommended the death penalty. Following a presentence investigation, the trial court held a sentence hearing and sentenced Bradley to death by electrocution.

(494 So.2d at 752)

- - - -

The facts surrounding the trial court's denial of the Petitioner's motion for new trial are as follows:

Prior to trial, the Petitioner's attorneys filed a discovery motion asking for all statements made by a Ricky McBrayer. Also prior to trial, the Piedmont Police Department informed Petitioner's counsel that McBrayer had confessed to Rhonda's murder but that the confession had been investigated by the Piedmont Police and Alabama Bureau of Investigation and it had been determined that McBrayer was not involved and that the confession was without grounds and was not true.

After the Petitioner's trial, his attorneys filed a motion for a new trial based on newly discovered evidence which alleged that the State had failed to disclose the name of Glen Burns, the person to whom McBrayer had confessed. The trial court denied this motion and that denial was affirmed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court.

(494 So.2d at 767-768)

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The facts pertinent to the propriety of the comments by the District Attorney in his closing argument to the jury are as follows:

The Petitioner was arrested following his indictment on March 22, 1983, and held without bond in the county jail until his trial on July 11, 1984. The Petitioner was not given Miranda warnings at either the time of his arrest upon the indictment or any time thereafter. By a letter to his wife dated July 4, 1983, the Petitioner admitted that he had left the house the night of Rhonda's disappearance. This was contrary to what the Petitioner had earlier told the Police when he had been questioned in December of 1983. The District Attorney cross-examined the Petitioner about why he never told the

police the whole truth, both before and after his arrest and argued the subject before the jury in closing arguments.

(494 So.2d at 767)

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The facts pertinent to the consent to search form signed by the Petitioner are as follows:

At 3:30 a.m. on January 25, 1983, the Petitioner walked into the Piedmont, Alabama Police Department and stated that he had argued with his step-daughter, Rhonda Hardin, the night before and then fell asleep and upon awakening at 11:30 p.m., discovered that Rhonda was missing. Between 8:30 and 9:30 a.m., Piedmont Police Officers arrived at Petitioner's residence and transported the Petitioner to the police station for questioning. They did not tell him he was under arrest. (494 So.2d at 455-458)

At tne police station, the Petitioner was given his Miranda rights and waived them stating that he had nothing to hide and did not see where he needed counsel. Petitioner stated he wanted to stay until he got this cleared up. Petitioner signed a written "permission to search" after the form was read to him and he was given an opportunity to read the form himself. The form stated as follows: "I am giving this written permission to these officers freely and voluntarily, without any threats or promises having been made, and after having been informed by said officer that I have a right to refuse this search and/or seizure."
(494 So.2d at 756)

The Petitioner voluntarily agreed to go to Birmingham, Alabama, on the afternoon of January 25,

1983, where he was administered different tests. The Petitioner admitted at trial he went to Birmingham voluntarily because he had nothing to hide and was willing to cooperate. Petitioner also went to Piedmont Medical Clinic and willingly gave blood and saliva samples. (494 So.2d at 756-757)

Petitioner was returned to his home at 4:00 a.m. of January 26, 1983, without being charged with this crime or placed under bond. The next day, Petitioner, while at his home, consented to a second search of his home and again signed a written permission to search. Petitioner returned to the police station several more times subsequent to this date.

(494 So.2d at 756-757)

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The facts pertinent to the trial court's questioning of the Petitioner at trial are as follows:

The Petitioner took the stand and testified in his own behalf. It was his testimony that on the night of the murder, he had left the house to steal a car and when he returned, Rhonda was gone. He stated that he had stolen a bicycle from a house and rode it to the location where he was going to steal the car. After Petitioner was questioned by his attorney and the District Attorney, the trial court asked the following questions:

> Q. Tell us exactly where it was that you got this bicycle.
>
> A. It was on Hughes Street.
>
> Q. And whose bicycle was that?
>
> A. It belonged to little Welsh boy, I believe is his name.
>
> Q. All right. And what size bicycle is that?
>
> A. It's a twenty-inch bicycle.

Q. And you rode a twenty-inch wheel bicycle from that point out the highway to Centre?

A. Yes, sir.

Q. I don't believe anybody asked you, why didn't you steal the car?

A. There was people up and about in the house.

Q. Any of those people see you?

A. No, sir, I don't think so. If they would, I believe they would have came out.

Q. Did anybody else see you on the way out there or back?

A. I can't say if they did or not.

Q. But you drove all the way out to this point where you intended to steal the automobile; is that right?

A. Yes, sir.

Q. And people were up?

A. Yes, sir.

Q. All right. And can you tell us--can you describe from your memory what house it was or where you went?

A. I can't depict the exact location, but I know the people that lived there.

Q. What was their name?

A. It would be Jennings.

Q. Jennings?

A. Yes, sir.

Q. Does their house face onto the highway

A. Yes, sir.

Q. And you left it back on Hughes Street?

A. Yes, sir, where I got it.

Q. Back at the Welsh house. And how far is Hughes Street, the Welsh house, from where you live?

A. From where I live?

Q. Uh-huh (affirmative).

A. Maybe two or three blocks.

Q. Well, when you were going then to notify your wife, you wanted to get to her, why didn't you think about--why didn't you use this bicycle to ride to the hospital?

A. I didn't think about the bicycle. I was upset because my step-daughter wasn't at home.

Q. You had ridden all the way out the highway and then back?

A. Yes, sir.

Q. Just three or four--two or three blocks from your house?

A. Yes, sir.

Q. And that you didn't think about it being there?

A. No, sir.

THE COURT: That's all I have.

(494 So.2d at 768-769)

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ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

The petition for writ of certiorari should be denied because the Alabama appellate courts correctly applied this Court's applicable decisions to each of the issues raised in the petition. All of the issues involve fact-specific matters peculiar to this case which are not of sufficient importance to merit certiorari review by this Court, particularly since they will be reviewed and decided in the 28 U.S.C. § 2254 proceeding which will inevitably follow a denial of certiorari by this Court.

I. THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO VIOLATION UNDER BRADY V. MARYLAND, 373 U.S. 83 (1963).

The Alabama Court of Criminal Appeals correctly decided under Brady v. Maryland, 373 U.S. 83 (1963), that the exculpatory evidence--McBrayer's confession--was in fact disclosed to defense counsel. That this is true is not in dispute. The only issue in dispute involves whether the State was required to divulge the name of the person to whom the confession was made. The lower court correctly held that the ruling of Brady or that of United States v. Agurs, 427 U.S. 97 (1976), requiring the disclosure of certain exculpatory evidence, was not violated because of the State's failure to inform defense counsel of the name of the man to whom McBrayer confessed.

(494 So.2d at 767-768)

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II.(a) THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO VIOLATION OF DOYLE V. OHIO, 426 U.S. 610 (1976) BY THE PROSECUTOR.

II.(b) THE COURT BELOW CORRECTLY HELD THAT PURSUANT TO ANDERSON V. CHARLES, 447 U.S. 404 (1980), DOYLE V. OHIO, 426 U.S. 610 (1976) DOES NOT APPLY TO THIS CASE.

The Alabama Court of Criminal Appeals correctly held that the closing arguments by the District Attorney did not constitute an improper comment on the Petitioner's post-arrest silence in violation of Doyle v. Ohio, 426 U.S. 610 (1976). The Court made a finding of fact that the Petitioner had not been given Miranda warnings after his arrest and thus, the comments were proper under the

holding of Fletcher v. Weir, 455 U.S. 603 (1982), which holds that a prosecutor may impeach a defendant with his post-arrest silence without violating due process when the defendant's post-arrest silence precedes Miranda warnings. The Court also correctly held that Doyle did not apply to the facts of this case since Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Anderson v. Charles, 447 U.S. 404 (1980). Here, the Petitioner made two inconsistent statements; the first to the police in his initial report of Rhonda's disappearance and the second in a letter to his wife. Thus, pursuant to Anderson, Doyle has no application to this case.

III. THE LOWER COURT CORRECTLY HELD THAT THE PETITIONER'S STATEMENTS AND CONSENT TO SEARCH WERE NOT TAINTED BY AN ILLEGAL ARREST.

The Alabama Court of Criminal Appeals correctly held that the Petitioner's consent to search was valid. The Court, pursuant to the holding of Schneckloth v. Bustamonte, 412 U.S. 218 (1973), made a determination from the totality of the circumstances that the consent was not the product of duress or coercion and was therefore voluntary under the Fifth Amendment. They correctly found that the Record supports the trial court's finding that "[a]t the police station the Defendant was fully advised of his legal rights and then indicated his desire to cooperate with the legal authority." The Court also made a finding of fact that the evidence supported a finding that in light of the cooperation displayed by the Petitioner at the police station and after his release, and considering that it was Petitioner himself who actually initiated the

investigation by reporting Rhonda's disappearance and soliciting the help of the police in finding her, the Petitioner's consent to search, as well as his statements, were not tainted by the illegal arrest. Taylor v. Alabama, 457 U.S. 687, 690 (1982).

(494 So.2d at 766)

IV. THE LOWER COURT CORRECTLY HELD THAT THE QUESTIONS ASKED OF PETITIONER BY THE TRIAL COURT WERE PROPER.

The Alabama Court of Criminal Appeals made a factual finding that the questions asked by the trial court of the Petitioner did not cast doubt on the Petitioner's credibility. The Court correctly found that by affording the Petitioner the opportunity to fully explain his reasons and his actions on the night of Rhonda's disappearance, the trial court allowed him to bolster and shore up his testimony giving previously unrelated facts and details which lent Petitioner's account some semblance of truth.

(494 So.2d at 768-769)

V. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE OF WHETHER AN OVERLAP BETWEEN THE AGGRAVATED ASPECT OF THE CAPITAL OFFENSE AND AN AGGRAVATING CIRCUMSTANCE FOR PURPOSES OF SENTENCE DETERMINATION VIOLATES THE EIGHTH AMENDMENT BECAUSE THE ISSUE IS CLEARLY WITHOUT MERIT.

The defendant was convicted of the capital offense of murder during a rape in the first degree under Code of Alabama 1975, §13A-5-40(a)(3).[1] In the subsequent

[1]The defendant was also convicted of the separate capital offense of murder during a sodomy in the first degree arising from the same incident.

sentence hearing the jury was allowed to consider as a statutory aggravating circumstance that the offense was committed while the defendant was engaged in a rape. Under his argument V the defendant contends that this involved two constitutional violations. First, he argues that allowing the State to use as an aggravating circumstance an element of the offense is contrary to the Eighth Amendment in that it relieves the State of the burden of proving that the death penalty is warranted. Second, the defendant argues that this procedure violates due process under Sandstrom v. Montana, 442 U.S. 510 (1979), because it allows the shifting of the burden of proof to the defendant. Both of these arguments are without merit.

Under Alabama's present capital murder statute several of the types of intentional murder designated capital offenses involve murder during the course of, respectively, kidnapping, robbery, rape, and burglary.[2] The aggravating circumstances that may be considered in

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[2]Code of Alabama 1975, §13A-5-40(a), provides in pertinent part as follows:

> (a) The following are capital offenses:
>
> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;
>
> (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;
>
> (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant;
>
> (4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

determining the sentence for a capital offense are provided under Code of Alabama 1975, §13A-5-49. Among these statutory aggravating circumstances is the following provided under §13A-5-49(4):

> (4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping; ...

There is, therefore, an overlap between the aggravating aspect of certain capital offenses (the element that must exist in addition to an intentional murder in order for there to be a capital offense) and an aggravating circumstance for purposes of sentence determination. In the case of a person convicted under §13A-5-40(a)(1) through (4)--in other words, murder during a kidnapping; murder during a robbery; murder during a rape; or murder during a burglary--the aggravating aspect of the offense will establish an aggravating circumstance under §13A-5-49(4). This relationship between the aggravating aspect of these offenses and the aggravating circumstances for sentence determination is recognized in Code of Alabama 1975, §13A-5-50, which provides as follows:

> The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of section 13A-5-40.

This sentencing scheme does not violate the Eighth Amendment. In Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), the Court

rejected Eighth Amendment challenges to the Georgia and Florida capital murder statutes. In both of these cases the basic offense for which the defendant was sentenced to death was murder. 428 U.S. at 162 n. 4; 428 U.S. at 248 n. 4. Under the Georgia statute the sentencing authority must find the existence of at least one of ten statutory aggravating circumstances before it can then proceed to determine whether the death penalty should be imposed. 428 U.S. at 196-197. In the case of the Florida statute the sentencing authority must decide whether the statutory aggravating circumstances outweigh the mitigating circumstances, 428 U.S. at 247-250; if no statutory aggravating circumstance exists a defendant cannot be sentenced to death. See, 428 U.S. at 255. With regard to both of these statutes, therefore, the finding of a statutory aggravating circumstance is necessary in order for a defendant to be within the category of murderers who may be sentenced to death. The Court held that these procedures, which narrow the category of crimes for which death can be imposed, are sufficient to distinguish in a meaningful way the few cases in which death is imposed from the many cases in which it is not. 428 U.S. at 198; 428 U.S. at 253.

Alabama's present capital murder statute operates in much the same way as Florida's and Georgia's. Under Alabama law a death sentence is imposed only where the statutory aggravating circumstances outweigh all mitigating circumstances, and a finding of at least one statutory aggravating circumstance is necessary in order for a defendant to fall within the category of defendants who may be sentenced to death. Code of Alabama 1975, §13A-5-46(e)(3). Thus, as with the Florida and Georgia statutes the existence of a statutory aggravating

circumstance separates those murderers who may be sentenced to death from those who may not, and the determination of whether death will actually be the sentence in a given case depends on whether aggravation outweighs mitigation. The only differences in the statutes in this regard is that, in cases under the Alabama statute involving intentional murder during the course of certain felonies, proof of an aggravating circumstance is presented at trial and the aggravating circumstance is in effect established by the verdict. In other words, the determination of whether the aggravating circumstance exists is made at the guilt stage rather than the sentence stage.

The defendant presents no argument as to how the determination of the existence of an aggravating circumstance at one stage of the proceeding rather than another is unconstitutional. On the contrary, Alabama's capital murder scheme is in this regard similar to that of Texas which was upheld by the Court in Jurek v. Texas, 428 U.S. 262 (1976). Under Texas law capital murder is defined as intentional murder committed under certain circumstances, including murder during certain felonies. 428 U.S. at 268, 273. In Jurek the Court recognized that the State of Texas, by so defining its capital offenses, in effect narrowed the category of murder for which the death penalty could be imposed, and that this inclusion of aggravation in the charged offense thus served the same purpose as the list of statutory aggravating circumstances under Florida and Georgia law. 428 U.S. at 270. For precisely this reason a similar argument regarding Louisiana's capital murder statute has been rejected by the Fifth Circuit. Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986).

The petitioner's argument that the State is relieved of its burden is simply incorrect. The State must establish that a defendant is eligible for the death penalty by proving an aggravating circumstance. Whether this occurs at the guilt stage or the penalty stage is irrelevant; the burden is still on the State, and the defendant still has the opportunity to refute the State's evidence. Moreover, in order for the defendant to be sentenced to death, the statutory aggravating circumstances must outweigh all mitigating circumstances. Therefore, no burden has been shifted to the defendant.

The petitioner's argument must fail because in his case the practical effect of placing an aggravating circumstance within the definition of the charged crime was the same as not doing so. Suppose Alabma had, like Florida, defined the capital offense simply as intentional murder, and had determined that the fact that the murder took place during a rape was an aggravating circumstance for purposes of sentence determination. In the trial of the petitioner's case the evidence of the accompanying rape would have been admitted as being within the res gestae of the murder. Because the evidence of the rape in the petitioner's case was sufficient to prove the rape beyond a reasonable doubt, this evidence would undoubtedly have been strong enough to establish the aggravating circumstance; the only difference would have been a technical one--that it was not established by the verdict itself. If, on the other hand, the evidence had not been sufficient to prove the rape beyond a reasonable doubt, the petitioner would have been distinctly worse off than under present Alabama law, because he would still have been guilty of a capital offense and could have been sentenced to death if another aggravating circumstance were found, whereas under

present Alabama law he would have been acquitted of the capital offense and could not have been sentenced to death.

The defendant also argues that the procedure in question violates Sandstrom v. Montana, 442 U.S. 510 (1979). This contention is also meritless. Sandstrom held that a shifting of the burden of proof to the defendant before the jury made its factual determination violated due process. By contrast, the Alabama capital murder statute, the State must prove the existence of at least one aggravating circumstance for the defendant to be eligible for the death penalty; the State shoulders this burden in the case of murders during certain felonies by proving the defendant guilty beyond a reasonable doubt of the charged charge. It is only after the State has proven the aggravating circumstance by convicting the defendant that the defendant need show any mitigating circumstances in order to avoid a death sentence.

For the above reasons the arguments raised by the defendant are meritless and not worthy of certiorari, and the Court should deny certiorari as to this issue.

VI. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE OF WHETHER THE FACTS SUPPORTED THE FINDING THAT THE CAPITAL OFFENSE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL COMPARED TO OTHER CAPITAL OFFENSES.

A. The Court Should Deny Certiorari As To This Issue Because It Is Clearly Without Merit and Therefore Unworthy of Certiorari Review.

Under Alabama's present capital murder statute, Code of Alabama 1975, §13A-5-39, et seq., one of the statutory aggravating circumstances which may be found is that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. Code of Alabama 1975, §13A-5-49(8). The trial court below, in sentencing the petitioner to death, found that this aggravating

circumstance existed in this case. Bradley v. State, 494 So.2d at 770. The petitioner contends, under his issue VI, that the facts do not support the trial court's findings.

This issue is clearly without merit for certiorari review. In considering the question of whether certain facts make out a particular statutory aggravating circumstance under state law, federal review is limited to the question of whether the state court findings are so unprincipled or arbitrary as to somehow violate the Constitution. Barclay v. Florida, 463 U.S. 939, 947 (1983) (plurality opinion). The decision below was in no way unprincipled or arbitrary. The Alabama Court of Criminal Appeals held that this aggravating circumstance applied in this case--the rape, sodomy, and murder of a twelve-year-old girl--on two different grounds. First, the Court of Criminal Appeals determined based on the Georgia Supreme Court's construction of a similar aggravating circumstance that this aggravating circumstance applies where there is sexual abuse prior to death. 494 So.2d at 770. Second, the Court of Criminal Appeals found that the case was very similar factually to a Florida rape/murder of a twelve-year-old girl in which the Florida Supreme Court held that the same aggravating circumstance was applicable. Id. This Court has previously noted with approval the limitations placed on this aggravating circumstance by the Florida Supreme Court. Proffitt v. Florida, 428 U.S. 242, 255-256 (1976) (plurality opinion).

Because the application of this aggravating circumstance to the facts of this case were reasonable and consistent with the decisions of other state courts, the decision in this case was certainly not unprincipled or arbitrary. The issue raised by the petitioner is, therefore, meritless on its face, and the Court should deny certiorari as to this issue.

B. The Court Should Deny Certiorari As To This Issue Because It Involves Relitigation of Questions of Fact Already Decided Below.

In arguing that the facts in this case do not support a finding of an aggravating circumstance the petitioner claims that "the facts are as consistent with an accidental strangulation during voluntary sex as they were with a deliberate strangulation during forcible sex." (petitioner's brief, p. 26). The jury, however, found the petitioner guilty of intentional murder during a rape by forcible compulsion and intentional murder during a sodomy by forcible compulsion. Bradley v. State, 494 So.2d at 769-770. The issue as presented by the petitioner thus involves a relitigation of the facts as established below and, in essence, an attack on the jury's verdict.

This Court does not generally sit to re-examine findings of fact. Grayson v. Harris, 267 U.S. 352, 358 (1925). This rule is especially applicable where the State's case is based primarily on extensive circumstantial evidence. Bradley v. State, 494 So.2d at 769-770. Because the petitioner's argument regarding the existence of this particular aggravating circumstance turns on a re-evaluation of the facts the Court should deny certiorari as to this issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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ALABAMA ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I, Martha Gail Ingram, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of the foregoing Brief and Argument on petitioner by placing three copies in the United States mail, first class postage prepaid, and properly addressed to his counsel of record as follows:

Hon. Alan Polsky
Attorney at Law
368 Veteran's Memorial Highway
Commack, New York 11725

This 14th day of January, 1987.

Martha Gail Ingram

MARTHA GAIL INGRAM
ASSISTANT ALABAMA ATTORNEY GENERAL

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

86–5307

LEWIS WILLIAMS
v.
OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

86–6015

DANNY JOE BRADLEY
v.
ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Nos. 86–5307 AND 86–6015. Decided March 9, 1987

The petitions for writs of certiorari are denied.

JUSTICE BRENNAN, dissenting from the denial of certiorari in both cases.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentences in these cases.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting from the denial of certiorari in No. 86–5307.

In this case, the Ohio Supreme Court rejected petitioner's claim that a statutory aggravating factor that repeats an element of the crime is unconstitutional because it fails to narrow the class of persons eligible for the death penalty. This decision is consistent with *Wingo* v. *Blackburn*, 783 F. 2d 1046, 1051 (CA5 1986), cert. pending, No. 86–5026, but in conflict with *Collins* v. *Lockhart*, 754 F. 2d 258, 263–264 (CA8), cert. denied, —— U. S. —— (1985). I would grant certiorari to resolve this conflict.

JUSTICE MARSHALL, dissenting from denial of certiorari in both cases.

In these cases, petitioners' death sentences were founded on statutory aggravating factors that repeat elements of the underlying capital offenses. For reasons stated in *Wiley* v. *Mississippi*, —— U. S. —— (1986) (MARSHALL, J., dissenting from denial of certiorari), I would grant the petitions for review.